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The Role of the President, the Senate and Congress with Respect to Arms Control Treaties Concluded by the United States - United States

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This paper examines the role of the U.S. Congress, Senate and President in the negotiation, formation, interpretation, and termination of treaties to which the United States is a party, focusing particularly on arms control treaties. In Part I we outline the fundamental or “black-letter” law with respect to treaties concluded under the President’s authority conferred by Article II of the U.S. Constitution, which requires the approval of two-thirds of the Senate. Most major arms control treaties have taken this form. Part II analyzes the role of Congress, as opposed to the Senate, in the conclusion of treaties as Congressional-Executive agreements. This alternative has not frequently been used for arms control treaties, but it is being considered in connection with the recent U.S.-Soviet bilateral chemical weapons agreement, and we argue that this procedure may be used more frequently. Part III describes in detail the formal record of Senate deliberations regarding arms control treaties, and draws some tentative conclusions about the actual impact of the Senate on those treaties and on the arms control negotiation process. Part IV outlines the role of the political branches in the interpretation and termination of treaties.

Our analysis is based primarily on the deliberations of the Senate and Congress and on their formal actions. Of course, the formal record does not tell the whole story. Senate and congressional influence on arms control has been ubiquitous and important. The formal record reveals the direction of that influence, but cannot show its precise impact. The formal record also is the most authoritative contemporary source of constitutional law relating to presidential, senatorial, and congressional prerogative. In the absence of judicial decisions, the law can best be inferred from the dialogue of the political actors most directly involved. Our pa-
per will describe that dialogue and hopefully elucidate the lessons to be
drawn from it.

I. THE FUNDAMENTAL LAW CONCERNING ARTICLE II TREATIES
UNDER THE CONSTITUTION OF THE UNITED STATES

Article II of the Constitution authorizes the President to "make"
treaties with the "advice and consent" of the Senate, provided two-thirds
of the Senators present concur. An Article II treaty may be a bilateral or
a multilateral international agreement, and is brought into force as an
international obligation of the United States by the formal act of ratifica-
tion or accession. This formal act (hereinafter called "ratification") is
separate from the act of signing the treaty and is accomplished pursuant
to an instrument executed by the President. Accordingly the Article II
Treaty Power is a Presidential power that requires Senate participation
prior to its exercise. As indicated below, U.S. constitutional law also
recognizes the legal authority of the President to conclude treaties on the
basis of authorization by majority vote of the Congress as a whole, either
in the form of general legislation or a joint resolution dealing specifically
with the agreement in question. International treaties concluded on the
basis of this constitutional procedure are known as Congressional-Execu-
tive agreements.

The decision to open a treaty negotiation, and the process of negoti-
ation itself, is exclusively a Presidential power. Congress, the Senate, or
individual Senators or members of Congress may influence the course of
a negotiation. For example, the record shows that Senator Pell, as a
member of the Senate Foreign Relations Committee (SFRC), was influ-
ential in stimulating negotiations leading to two minor arms control
agreements. In addition, Senator Jackson and the conservative wing of
the Congress clearly influenced the negotiation of SALT II as well as the
choice of constitutional procedure selected by President Carter to bring it
into force. More recently, the views of Senator Helms have undoubtedly
been taken into account as they represent an important conservative con-
stituency within the U.S. political culture. However, neither the Senate
nor the Congress has any constitutionally recognized role prior to the
submission of a treaty to the Senate or Congress for approval, and a
treaty may be concluded by the President and implemented on the basis
of prior general authorization.

Current constitutional practice represents a conspicuous departure from the original understanding of Article II, which says that treaties are made with the "advice" as well as the "consent" of the Senate. That language seems to envision Senate participation prior even to the negotiation, and certainly before the conclusion of treaties. However, this understanding was quickly reinterpreted informally. In 1789, in connection with an upcoming negotiation, President Washington personally appeared before the Senate and asked its advice on a series of specific negotiating questions. The Senate postponed consideration of all but one such question to a second session. This procedure proved unsatisfactory to both the President and the Senate, and was abandoned. Even the practice initiated by President Washington of seeking written advice on particular negotiating questions was abandoned by Washington before the end of his first Administration. A congressional study reported that "by 1816 the practice had become established that the Senate’s formal participation in treaty-making was to approve, approve with conditions, or disapprove treaties after they had been negotiated by the President or his representative." An attempt in 1973 by Senator Hartke to affirm the "historic" role of the Senate in treaty-making by constituting it as a council of advice for that purpose came to naught in the face of Executive branch constitutional objections. Individual Senators or members of Congress may nevertheless influence the course of negotiations informally through expressions of views at hearings, participation as advisers to the U.S. delegation to a negotiation, and other informal methods.

If a negotiation produces an international agreement, the President may submit the agreement as an Article II treaty to the Senate for its advice and consent to ratification by a two-thirds vote. However, the President is not constitutionally required to do so. Historical practice has confirmed that there are three additional sources of authority for Presidential conclusion of an international agreement on behalf of the United States. Accordingly the President must choose the most appropriate basis in domestic constitutional law for bringing the agreement into force. Most importantly the President may seek congressional au-

3. Id. at 36.
4. S. Res. 99, 93rd Cong., 1st Sess., 119 CONG. REC. 7274-75 (1973), was opposed by the Department of State on the grounds that the consistent practice since Washington has been to consult but not to use the Senate as a "Council of Advice." ARTHUR W. ROVINE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 172-76 (1973).
5. Treaties and Other International Agreements, in DEPT OF STATE FOREIGN AFFAIRS MANUAL §§ 700-721 (1974) [hereinafter cited as Circular 175].
Authorization of an international agreement by majority vote of both houses of Congress, by joint resolution or act of Congress, or he may use existing legislation as a basis for ratification of the agreement. The use of these Congressional-Executive agreements as an alternative to the Article II procedure has become accepted as constitutionally equivalent to the Article II procedure.

In addition, an international agreement may be contemplated by an earlier Article II treaty and derive its authority from the earlier treaty. Such an agreement has the same legal force internationally and domestically as an Article II treaty. Finally, an international agreement may be concluded on the basis of the President's foreign affairs power or the Commander-in-Chief power. Many arms control treaties have been concluded on the basis of this authority, although these treaties tend to deal with consultation, notification, and relatively routine or non-controversial matters. Nevertheless, those treaties, known as Presidential-Executive agreements, have the same effect internationally as an Article II treaty or a Congressional-Executive agreement.

The State Department has promulgated a regulation, known as the Circular 175 Procedure, which purports to guide the President's choice of procedure to follow in bringing an international agreement into force. This State Department regulation requires that due consideration be given to such factors as the formality, importance, and duration of the agreement, the preference of Congress, the need for implementing legislation by Congress, the effect on state law, and past U.S. and international practice. Under Circular 175, officials of the Executive branch may consult with the Senate Foreign Relations Committee as to the choice of constitutional procedure. The Circular 175 factors are rather general and may sometimes suggest inconsistent choices, and probably do not have much impact on actual Executive branch decisions. Rather, the choice of constitutional procedure is basically a political choice.

Historically, international agreements dealing with boundaries, arms control, military alliances, extradition, and investment have normally been submitted to the Senate as Article II treaties, while international agreements dealing with trade, finance, energy, fisheries, and aviation have normally been concluded as Congressional-Executive agreements. Nevertheless, there is no constitutional requirement that this general historical practice be continued. In a departure from at least the general pattern of past practice, the Bush Administration decided to treat the 1990 U.S.-Soviet

6. Id.
7. See infra part III.
Chemical Weapons Agreement as a Congressional-Executive agreement. Finally, an agreement may be concluded as an Article II treaty that is "non-self-executing" and is therefore subject to the enactment of implementing legislation by Congress prior to its ratification, thereby involving both the Senate and the Congress as a whole.

If the President chooses to submit an international agreement to the Senate as an Article II treaty, the Senate may consent to its ratification subject to conditions that bind the President if he chooses to ratify the treaty. Those conditions may require the President to attach a reservation to United States adherence to the treaty or to amend the treaty by agreement with the other treaty party or parties. Senate-imposed conditions may also require the President make a specified declaration to the other treaty party or parties in connection with ratification; or a Senate-imposed condition may state an understanding that the Senate seeks to impose on the President or the U.S. courts, for example, an understanding regarding a particular interpretation of the treaty's domestic effect. The President normally includes Senate-imposed conditions requiring agreement by, or communication to, the other treaty party or parties in an instrument exchanged with the treaty partner or deposited specifically in connection with ratification. However, the President has claimed the constitutional power to comply with Senate-imposed conditions outside the formal ratification process.

A Senate-imposed condition must relate to the subject matter of the treaty and may not infringe other provisions of the Constitution, such as the Bill of Rights or the President's foreign affairs power. President Reagan took the position that a Senate condition attached to its resolution of ratification for the INF Treaty was an unconstitutional incursion into the President's foreign affairs power. His position was forcefully disputed.

In Missouri v. Holland, the Court upheld the validity of a treaty-related act of Congress that arguably contravened the Tenth Amendment absent the treaty. That Amendment protects the rights of each of the fifty states comprising the United States. This decision caused considerable concern that a treaty might supersede other constitutional provisions, including the Bill of Rights. However, in Reid v. Covert, a plurality of justices opined that a treaty may not contravene an individual liberty specifically protected by the Bill of Rights. Of course, the content of such a right may be altered by the existence of a treaty and the foreign

location of the government activity. Following the Senate's advice and consent, the President makes an independent decision as to whether to ratify the treaty, thereby bringing it into force as an international obligation of the United States, subject to the conditions imposed by the Senate. The President also exercises the power to accept or reject proposed reservations by other parties to a treaty, without the participation of the Senate.

II. CONGRESSIONAL-EXECUTIVE AGREEMENTS

Congressional-Executive agreements are international treaties that are concluded on the basis of a general or specific act of Congress authorizing the treaty. They have always been treated as constitutionally equivalent to Article II treaties. As noted above, the decision as to which alternative to select is a Presidential power, and the criteria for distinguishing the two alternatives are unclear at best. The choice in the end seems to be a political choice made by the President. Major arms control treaties have normally been concluded under Article II, and members of the Senate have often expressed the view that major treaties must be so concluded. However, the historical record does not support that contention.

The earliest example of a congressional-executive agreement by prior authorization occurred in 1792, when Congress passed legislation authorizing the United States Postmaster General to enter into international postal agreements. In the nation's first fifty years under the Constitution, 1789-1839, sixty international agreements were concluded as Article II treaties, while only twenty-seven international agreements were concluded as executive agreements either with or without congressional assent, i.e., as Congressional-Executive agreements or as Presidential-Executive agreements. During the next fifty years, from 1839-1889, the number of Article II treaties concluded, 215, roughly equaled the number of executive agreements, 238. The number of executive agreements concluded began to surpass the number of Article II treaties

13. This part has been adapted from Jack S. Weiss, Comment, The Approval of Arms Control Agreements as Congressional-Executive Agreements, 38 UCLA L. Rev. 1533 (1991).
15. Congressional Research Serv., supra note 2, at 36-40.
16. Id.
during the period between 1889-1939. During this period, 917 executive agreements were concluded, as opposed to 524 Article II treaties. 17

It has frequently been asserted that major agreements must be concluded under Article II. However, the record does not support that contention. Many of the executive agreements concluded during the nineteenth century were of great importance to the nation. The treaty finalizing the annexation of Texas, upon its rejection by the Senate, was subsequently approved by a joint resolution of both houses of Congress; 18 this congressional action was upheld by the Supreme Court. 19 Likewise, the annexation of Hawaii was accomplished by a joint resolution of Congress after the Senate failed to ratify a treaty of annexation. 20 Clearly, matters of great importance to the nation may be concluded as Congressional-Executive agreements. Significant international agreements in the early twentieth century were also approved as Congressional-Executive agreements. After the Senate failed to ratify the Treaty of Versailles, ending World War I, Congress declared the end of the war by a joint resolution; 21 Congress also passed a joint resolution approving the entry of the United States into the International Labor Organization. 22

The use of executive agreements has grown dramatically in the twentieth century. 23 The statistics show quite strikingly that the Congressional-Executive agreement and the Presidential-Executive agreement have eclipsed the Article II treaty as the dominant form of international agreement in the United States in the modern era. From 1939 to 1982, the United States concluded 608 Article II treaties and 9,548 executive agreements. 24 In 1982 alone the United States concluded

17. Id.
18. 5 Stat. 797 (1845); see WALLACE MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS: DEMOCRATIC PROCEDURE UNDER THE CONSTITUTION OF THE UNITED STATES 62-67 (1941); McDougal & Lans, supra note 14, at 263-64.
20. 30 Stat. 750 (1898); this method of annexation was approved by the Supreme Court in Hawaii v. Mankichi, 190 U.S. 197 (1903). See also MCCCLURE, supra note 18, at 67-68; McDougal & Lans, supra note 14, at 266-67.
23. One commentator suggests three reasons for the explosion in the number of formal international agreements to which the United States is a party:

First . . . is the growth in the number of nations in the world community. In 1945 there were some fifty nations with which the United States concluded international agreements. . . . Today there are closer to 150 nations in the world community. . . . Second, only in the period following World War II has the United States become a highly active participant in world politics. . . . Third, there are many more subjects today that are part of the international agreement making process than in years past.

24. CONGRESSIONAL RESEARCH SERV., supra note 2, at 36-40.
372 executive agreements and only seventeen Article II treaties.\(^25\)

Moreover, historical practice does not support the argument that defense-related agreements should take the form of Article II treaties.\(^26\)

One study of America’s international agreements between 1946 and 1972 found that four percent of America’s defense-related agreements during this period took the form of Article II treaties, twelve percent were Presidential-Executive agreements, and eighty-four percent were Congressional-Executive agreements (by either prior statutory or subsequent legislative authorization).\(^27\) Moreover, this study found that while most of the defense-related Article II treaties were “significant,” a larger number of the executive agreements met the same criteria for significance.\(^28\)

Nevertheless, the record of United States-Soviet arms control over the past thirty years shows that most United States-Soviet arms control agreements\(^29\) have been concluded as Article II treaties.\(^30\) However,

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\(^{25}\) Id. at 38-39. “On January 1, 1983, the United States was a party to 966 treaties and 6,571 executive agreements in force.”

\(^{26}\) LAWRENCE MARGOLIS, EXECUTIVE AGREEMENTS AND PRESIDENTIAL POWER IN FOREIGN POLICY (1986).


\(^{28}\) Id.


\(^{30}\) The United States was a party to eighteen nuclear arms control agreements as of 1986; of these, 12 were Article II treaties, five were Presidential-Executive agreements, and one was a Congressional-Executive agreement (the SALT I Interim Agreement). HOUSE FOREIGN AFFAIRS COMM., SUBCOMM. ON ARMS CONTROL, INT’L SECURITY AND SCIENCE OF THE HOUSE COMM. ON FOREIGN AFFAIRS, 99TH CONG., 2D SESS., FUNDAMENTALS OF NUCLEAR ARMS CONTROL 394-95 (Comm. Print 1986) (prepared by the CONGRESSIONAL RESEARCH SERV.) [hereinafter FUNDAMENTALS OF NUCLEAR ARMS CONTROL]. Senate consent to the multilateral Convention on the Physical Protection of Nuclear Material was followed by congressional approval of implementing legislation. Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, Pub. L. No. 97-351, 96 Stat. 1663, 18 I.L.M. 1419; (1982) (codified at 18 U.S.C. §§ 831, 1116 (1982)). Entry into force of the Exchange of Notes Between the United States of America and the Union of Soviet Socialist Republics Concerning the Direct Communications Link Upgrade (known as the Additional Hotline Modernization Agreement) as a Presidential-Executive agreement was followed by congressional enactment of legislation endorsing the agreement and authorizing necessary equipment for its implementation. Exchange of Notes Between the United States of America and the Union of Soviet Socialist Republics Concerning the Direct Communications Link Upgrade, July 17, 1984, United States-USSR, Pub. L. No. 99-85, 99 Stat. 286, 23 I.L.M. 1393 (1985).


Recent United States-Soviet arms control agreements which have been concluded as Presidential-Executive agreements include: Agreement on Principles of Implementing Trial Verification and Stability Measures That Would Be Carried Out Pending the Conclusion of the U.S.-Soviet Treaty on
there are three major congressional deliberations indicating that there is no constitutional requirement that such agreements be concluded under Article II. First, the executive and legislative branches expressly acknowledged the constitutional equivalence of Congressional-Executive agreements and Article II treaties during their deliberations leading to the enactment of legislation authorizing the Arms Control and Disarmament Agency. Second, one of the major arms control treaties of the 1970s—the SALT I Interim Agreement—is a solid precedent for concluding future arms control agreements as Congressional-Executive agreements. Third, the decision to submit SALT II as an Article II treaty shows that the nature of the decision is political, since the SALT I Interim Agreement and SALT II were quite similar in terms of coverage, importance, and duration. The congressional debate of these three matters provides the strongest evidence, in the absence of judicial decision, of the current understanding of the constitutional prerogatives of Congress, the Senate, and the President in the conclusion of arms control treaties.

A. Section 33

Congress enacted the Arms Control and Disarmament Act of 1961 to create the Arms Control and Disarmament Agency. Congress’s purpose was “to provide impetus toward [the goal of reducing the risk of war] by creating a new agency of peace to deal with the problem of reduction and control of armaments looking toward ultimate world disarmament.”

Section 33 of the Act provides in part that:

[N]o action shall be taken under this chapter or any other law that will obligate the United States to disarm or to reduce or to limit the Armed Forces or armaments of the United States, except pursuant to the treaty making power of the President under the Constitution or unless authorized by further affirmative legislation by the Congress of the United States.

For the contention that the Article II, § 2 process is inadequate for United States-Soviet arms control, see George Bunn, Missile Limitation: By Treaty or Otherwise? 70 COLUM. L. REV. 1 (1970).
This provision's apparent equation of "the treaty making power of the President under the Constitution" with "further affirmative legislation by the Congress" has been cited by members of Congress for the proposition that Article II treaties and Congressional-Executive agreements represent equally appropriate means of approving arms control agreements. Since a Congressional-Executive agreement represents the enactment of "further affirmative legislation" authorizing the President to bring an international agreement into force, the plain language of section 33 does equate Article II treaties and Congressional-Executive agreements.

The legislative history of the section 33 proviso does not undermine this reading of the statute. It suggests that Congress was focusing primarily on an effort to restrict the President's ability to conclude arms control agreements as Presidential-Executive agreements. The section 33 proviso was added to the ACDA bill by a floor amendment offered by Representative L. H. Fountain during House consideration of the bill on September 19, 1961. Representative Fountain told the House that [t]his amendment is designed to insure that on the subject of arms control no President . . . will ever take any action that is not in conformity

34. See 134 CONG. REC. H1683-84 (daily ed. Apr. 19, 1988) (memorandum to the House Foreign Affairs Committee from the Counsel to the Clerk of the House of Representatives) (inserted in the Record by Rep. Fascell); id. at H1681-83, H1685 (statements of Reps. Fascell and Berman).

During House consideration of a resolution urging the Senate to ratify the INF Treaty, Rep. Dante Fascell contended that a letter from the State Department's Deputy Legal Adviser supported the proposition that, under § 33, Article II treaties and congressional-executive agreements represent equally appropriate means of approving arms control agreements. The Deputy Legal Adviser wrote:

Section 33 of the Arms Control and Disarmament Act provides that the President may not obligate the United States to reduce or limit U.S. armaments except pursuant to the treaty-making power or unless authorized by further legislation. Neither the Act nor the Constitution dictates which of these two options the President should exercise with respect to a particular agreement.

Id. at H1684 (State Department Deputy Legal Adviser's memorandum regarding the form of submission of arms control agreements) (inserted in the Record by Rep. Fascell) (emphasis added).

This passage suggests that the Bush Administration considers Article II treaties and Congressional-executive agreements to be equivalent alternatives; it does not suggest that the Bush Administration considers § 33 to be unconstitutional or invalid.

The Bush Administration's then-nominee to be Legal Adviser to the Department of State seems to have endorsed the validity of § 33 during his confirmation hearings. In response to a question by Sen. Joseph Biden asking whether "a joint resolution is sufficient and it [the chemical weapons agreement] is not required to be treated as a treaty obligation," Edwin D. Williamson responded, "Yes . . . . In the arms control and disarmament agreement [sic] that is contemplated as an alternative process." Senate Committee on Foreign Relations, Transcript of Confirmation Hearing of Edwin D. Williamson to be Legal Adviser to the Department of State 32, Aug. 1, 1990 (provided by the Senate Foreign Relations Committee) (on file with the authors) [hereinafter Williamson Hearing].

See also Congressional Oversight of Executive Agreements: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 92d Cong., 2d Sess. 329-30, 339-43 (statement of J. Fred Buzhardt); John A. Boyd, Contemporary Practice of the United States Relating to International Law, 72 AM. J. INT'L L. 375, 391-98 (1978) (State Department and Senate Foreign Relations Committee decide that nonbinding political statements by the United States and the Soviet Union endorsing continued adherence to the SALT I Interim Agreement do not implicate § 33; this indicates that the State Department does not question the validity of § 33).
with the Constitution . . . the President cannot under this amendment commit America to [an arms reduction proposal], except pursuant to the treaty-making power under the Constitution, or by affirmative legislation by both the House and the Senate. It forbids a President acting on his own. 35

The Chairman of the House Foreign Affairs Committee, Representative Thomas E. Morgan, told the House that his committee would accept Representative Fountain’s amendment, and the amendment was incorporated into the bill without objection. 36

During House consideration of a motion to go to conference with the Senate to reconcile differences between House and Senate versions of the bill, Representative Fountain repeated his concern that “there . . . be no reduction or limitation of arms except in keeping with the treaty-making power of the President under the Constitution, or unless there is other affirmative legislative action on the part of the Congress.” 37

The House-Senate conference committee agreed to leave Representative Fountain’s amendment in the final version of the bill. The House bill’s Conference Report then made an entirely different, and unrelated, point:

The managers on the part of the Senate accepted the proviso with the understanding that its language does not interfere in any way with the President’s authority to control the size of U.S. Armed Forces under existing law. The managers on the part of the House concurred in this interpretation of the proviso. 38

Neither the House nor the Senate floor debate on the approval of the conference report reveals much information about congressional understanding of the section 33 proviso or about the Senate’s position that the proviso “does not interfere in any way with the President’s authority to control the size of U.S. Armed Forces under existing law.” 39 It would appear that the Senate conferees were concerned with maintaining a Presidential prerogative, not with asserting a Senatorial prerogative, and they implicitly accepted a congressional role equal to that of the Senate.

Senator John Sparkman, floor manager of the conference report on the ACDA bill, told the Senate that the proviso “did not appear in the Senate bill because it was implicitly assumed that such was the case in any event. The House conferees, however, believed that it was useful to

37. Id. at 20,537 (statement of Rep. Fountain).
39. The House debate is found at 107 CONG. REC. 20,898-906 (1961); the Senate debate is found id. at 21,042-46.
spell this assumption out, and we agreed."40

The paucity of section 33's legislative history should allow us to interpret its terms—and the Senate's statement in the conference report—in a manner which simply gives effect to the plain meaning. The record of congressional consideration of the ACDA bill reveals widespread concern that, during the height of the Cold War, creation of the new arms control agency could enable the President to strike bargains with the Soviet Union that would damage United States national security.41 A superpower arms control agreement was an unknown quantity in 1961, and, after the missile gap and other Cold War scares, many members of Congress and the public might have feared that the new agency would aid the President in unwisely limiting United States nuclear and other military capabilities.42 As such, Representative Fountain's amendment may well have been understood by members of Congress to assure that no such Presidential-Executive agreements would be concluded. Nevertheless, in the course of making that point, the amendment articulated an assumption—in plain and easily understood language, and which the Senate accepted—about the equivalence of Congressional-Executive agreements and Article II treaties.

Two years after the enactment of the Arms Control and Disarmament Act of 1961, the Senate debated and passed legislation which would have removed the following language from section 33—"pursuant to the treaty-making power of the President, under the Constitution, or unless authorized by further affirmative legislation by the Congress of the United States"—and replaced it with the following language—"in accordance with the constitutional processes of the United States."43 This Senate action and the accompanying debate indicate that the Senate recognized that its acceptance of the section 33 proviso demonstrated Senate acceptance of the equivalence of Article II treaties and Congressional-Executive agreements in arms control.

The sponsor of the proposed language, Senator Frank J. Lausche, argued on the floor of the Senate that:

My fear is that the language now in the bill creates a fuzzy situation which might be interpreted as meaning that the President, instead of

40. Id. at 21,043. Arguably this remark indicates that Sen. Sparkman accepted the equivalence of Article II treaties and congressional-executive agreements.
41. The House debate on the ACDA bill begins id. at 20,249 (1961); the Senate debate begins id. at 17,649 (1961).
proceeding by way of treaty, may proceed by way of agreement, and thus require only a majority vote of both Houses of Congress, instead of a two-thirds vote of the Senate, as the Constitution requires in connection with the making of treaties.\[44\]

The House Foreign Affairs Committee rejected the Senate’s proposed amendment to section 33.\[45\] During later Senate consideration of the same legislation (which no longer contained the proposed amendment to section 33), Senate Foreign Relations Committee Chairman J. William Fulbright submitted a statement for the Record which contended that “[i]t has always been understood by the committee and the Senate that major agreements . . . would be submitted as treaties whereas minor agreements . . . would not.”\[46\] It would appear that this subsequent deliberation in the Senate confirms the plain meaning of the Fountain amendment.\[47\] Whatever the value of post hoc agreed explanations of legislative intent,\[48\] Senator Fulbright’s unilateral and disputed interpretation seems unpersuasive, especially in light of Senator Lausche’s stated reason for proposing his amendment.

More recently, Senators Claiborne Pell and Jesse Helms, the Chairman and ranking minority member of the Senate Foreign Relations Committee, appear to have endorsed section 33 in a letter to President Bush urging the President to submit the United States-Soviet Chemical Weapons Agreement to the Senate as an Article II treaty. The Senators wrote that “we wish to stress . . . the legal requirement (under section 33 of the Arms Control and Disarmament Act) that no arms control agreement be undertaken without congressional approval . . . .”\[49\] Their letter also stressed that a “significant international obligation” such as the chemical weapons agreement be concluded as an Article II treaty.

\begin{center}
\textbf{B. SALT I Interim Agreement Debate}
\end{center}

The SALT I debate referred to the same issue and arrived at the same conclusion. The SALT I negotiations between the United States

\[44\] Id. at 10,958.
\[47\] For an argument that the above post hoc legislative action indicates that the principal meaning of § 33 is the restraint of unilateral Presidential action in arms control, see Raymond Celada, Is Congressional Approval of the SALT I Interim Agreement Required? (Sept. 8, 1977) (unpublished memorandum prepared by the Congressional Research Service) (on file with the authors).
\[48\] The Supreme Court has denied effect to such explanations. Fourteen Diamond Rings v. United States, 183 U.S. 176, 180 (1901).
\[49\] Letter from Senators Claiborne Pell and Jesse Helms to President George Bush (May 29, 1990) (on file with the authors).
and the Soviet Union produced two arms control agreements in 1972: the ABM Treaty, which limited each side's ability to construct strategic defenses; and the Interim Agreement on Strategic Offensive Arms, which limited for five years the number of each side's intercontinental ballistic missiles (ICBMs) and submarine-launched ballistic missiles (SLBMs). President Nixon submitted the ABM Treaty to the Senate for its advice and consent to ratification. He submitted the Interim Agreement to both the House and the Senate for approval by a joint resolution.50

The Nixon Administration did not offer Congress a detailed legal justification for the bifurcated congressional consideration of the SALT I agreements or for its decision to submit the Interim Agreement to both houses of Congress. At only one point in the SALT I record did a member of Congress press an Administration representative for the legal rationale for House consideration of the Interim Agreement:

Mr. Frelinghuysen. It is not clear to me [what] the relationship between the treaty and the Interim Agreement is or why the House is involved in the process of approval.

Of course, it is good for our own self-esteem to be brought into a problem like this that normally would fall to the lot of the Senate. This is called an Interim Agreement. Does this have anything to do with an executive agreement? It is called interim because it is not substantial enough to be called a treaty; is that it?

Secretary Rogers. That is correct. But it is an agreement of considerable importance. It relates to the treaty for obvious reasons, reasons I mention in the statement.

Therefore, they should be acted upon together. We did not submit the Interim Agreement to Congress because of congressional self-esteem, but we think it is a matter of national interest, and we think the House should give full consideration to the agreement and in a sense to the treaty itself, although, as you point out, you do not have the power of ratification. But they are of such significance, these two agreements, that we felt it was desirable to have full consideration by Congress.

I think it was a wise decision.

Mr. Frelinghuysen. It is a peculiar role for the House.

You spent most of the time talking about the treaty, which, in theory, has no relationship to our immediate responsibilities, yet the Treaty is so bound up with the Interim Agreement that you couldn't

50. In President Nixon's letter of transmittal of the ABM Treaty and the Interim Agreement to Congress, he asked for "the Senate's advice and consent to ratification of the Treaty, and an expression of support from both Houses of the Congress for the Interim Agreement on Strategic Offensive Arms." H.R. Doc. No. 311, 92d Cong., 2d Sess. 1 (1972), reprinted in Joint Resolutions to Consider Approval of Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with Respect to the Limitation of Strategic Offensive Arms: Hearings Before the House Comm. on Foreign Affairs, 92d Cong., 2d Sess. 117 [hereinafter House SALT I Hearings].
appreciate the agreement without understanding what the treaty provides.

Secretary Rogers. That is correct.

I suppose we could have proceeded on the basis that it was only necessary to get ratification of the treaty and the agreement could be signed by the President without any congressional authority, but we decided that was not the wise course to follow for the reasons I mentioned.

You are correct. They are linked together.51

Secretary Rogers’s testimony seems confused. On the one hand, he indicates that the Interim Agreement was submitted to both houses of Congress because it was not substantial enough to be a treaty. This undercuts the case for Congressional-Executive agreements. Furthermore, Secretary Rogers contends that the Interim Agreement could have been approved as a Presidential-Executive agreement, thus bypassing Congress altogether. On the other hand, Secretary Rogers indicates that the Interim Agreement is of “considerable importance” and “such significance,” and is intimately linked to the ABM Treaty. Given this rhetoric, it is not clear why such a “matter of national interest” does not rise to the level of significance supposedly reserved for Article II treaties.

President Nixon and National Security Adviser Henry A. Kissinger contended that the limited duration and limited scope of the Interim Agreement justified its submission to Congress as a Congressional-Executive agreement.52 While the agreement itself was slated to expire in


The President referred to the Interim Agreement as “the Executive Agreement, which is indicated as being . . . not a permanent agreement—it is for five years—and not total. It covers only certain categories of weapons.” Id. at 392.

The following exchange between National Security Adviser Henry A. Kissinger and Rep. Otis Pike occurred at a White House briefing Dr. Kissinger conducted for members of Congress following President Nixon’s remarks. It illustrates that the limited duration and scope of the SALT I Interim Agreement were key factors in the Nixon Administration’s decision to submit the agreement to Congress as a Congressional-Executive agreement:

Congressman Pike. Dr. Kissinger, if I understand the philosophy whereby one of these agreements requires a treaty and the other is an executive agreement, it has to do with the fact that the executive agreement is limited to a term of years. As we look ahead to SALT II . . . [for how long a period of years could an executive agreement be made which was not required to be a treaty? Could it be for 25 years, for example?]

Dr. Kissinger. [This] is an important Constitutional question: At what point does an
1977, the offensive ceilings it established were likely to be codified in a subsequent SALT II agreement; in fact, the duration of the Interim Agreement was extended by a nonbinding political agreement between the United States and the Soviet Union in 1977. This nonbinding political agreement was later superseded by the SALT II agreement in 1979 which, although never ratified, was adhered to by both sides. Therefore, the actual offensive limitations reached during the SALT I negotiations were anything but temporary, and were not contemplated as only temporary.

The Interim Agreement was arguably limited in scope because it did not include restrictions on bomber-carried nuclear weapons or an important category of long-range missiles—those with multiple independently targeted reentry vehicles (MIRVs). The exclusion of bomber-carried nuclear weapons and MIRVs from the Interim Agreement certainly made the agreement less comprehensive than many hoped at the time. Still, the limitations on ICBMs and SLBMs represented significant restrictions on both sides’ nuclear arsenals, especially since these ceilings endured beyond their slated five-year lifespan, and because the ABM Treaty would not have been agreed to in the absence of a companion offensive accord. In this sense, the scope of the Interim Agreement cannot be said to be limited.

executive agreement achieve character of such permanence that it should really more properly be in the form of a treaty?

There were two reasons why the executive agreement was put into that form. One was because of its limited duration and secondly because of its limited scope. That is to say, here we had an agreement, the major categories of which were going to be included again in a more comprehensive negotiation leading to a more permanent arrangement.

For example, the disparity which is involved for a limited period of time might not prove acceptable for a more permanent arrangement.

For this reason, that is to say the limited duration and the limited scope, it was decided that an Executive Agreement which, however, is submitted to the entire Congress, was more appropriate.

If you got to the point where you made a 25-year agreement, I don't want to prejudge that issue, but, as a political scientist and not as a presidential assistant, it would look more like a treaty to me. But I don't want to get into that.

Id. at 407 (briefing by National Security Adviser Kissinger).

Secretary of State William P. Rogers testified before the Senate Foreign Relations Committee that “[t]he offensive arms limitations are temporary and not comprehensive. They do not cover all strategic delivery vehicles. For example, strategic bombers, where the U.S. already has a very large advantage, are not limited by the interim agreement.” Id. at 9.

Other key SALT I officials had different understandings of why the Interim Agreement was submitted to Congress as a congressional-executive agreement. According to Paul Nitze, a SALT I negotiator, “[n]ot a formal treaty like the ABM treaty, which required the advice and consent of the Senate, the SALT I Interim Agreement nonetheless needed congressional approval before it could take effect, as mandated by a provision in the 1961 Arms Control and Disarmament Act.” PAUL NITZE, FROM HIROSHIMA TO GLASNOST 332 n.3 (1989).
C. SALT II

The SALT II Treaty, which President Carter and Soviet leader Leonid Brezhnev signed on June 18, 1979, established numerical limits on ICBMs, SLBMs, and bomber-delivered nuclear weapons, banned the construction of certain new ICBM launchers, imposed qualitative constraints on the development of new types of missiles, and limited the number of warheads which existing missiles could carry. In essence, SALT II began with the foundations established by the SALT I Interim Agreement and added more specific and detailed limitations.

Although the SALT II Treaty was not designated an "interim" agreement, its duration was expressly short-term. The provisions outlined above were to remain in force until the end of 1985, and a protocol to the treaty prohibiting the testing and deployment of mobile ICBMs was to remain in force only until the end of 1981. The treaty expressly contemplated the adoption of a more restrictive arms control regime after the treaty's expiration in 1985. These attributes of SALT II closely mirror the attributes of the SALT I Interim Agreement, since both agreements were short-term and both covered the same subject. Therefore, this diminishes further the persuasiveness of the argument that the SALT I Interim Agreement's limited duration set it apart from Article II treaties and made it an appropriate subject for a Congressional-Executive agreement, and that duration is determinative of an arms control agreement's proper form.

SALT II is perhaps best remembered for being one of the first casualties of the Soviet invasion of Afghanistan; in the wake of this invasion, further Senate consideration of the treaty was terminated. What is less well remembered about SALT II is that the Carter Administration had considered submitting the agreement to Congress as a Congressional-Executive agreement rather than as an Article II Treaty. The United States SALT II delegation was even instructed to change the heading at the top of the draft SALT II agreement to reflect this possibility.

Statements by President Carter and chief United States arms control

53. See James MacGregor Burns, Jimmy Carter's Strategy for 1980—Leader or Born-Again Broker?, ATLANTIC MONTHLY, Mar. 1979, at 41, 42 ("[I]f a SALT agreement is blocked or emasculated in the upper chamber, [President Carter] will ask both House and Senate for a simple majority vote of approval; and if this approval is not forthcoming, he will on his own authority as Chief Executive observe the terms of a SALT agreement as long as he is President."); Robert G. Kaiser, Selling SALT to the Senate, WASH. POST, May 28, 1978, at A1, A19; see also Chronology of SALT II Negotiations, 37 CONG. Q. WEEKLY REP. 1179, 1182 (1979); David E. Rosenbaum, The 95th Congress: No Sweeping Changes, 36 CONG. Q. WEEKLY REP. 2999, 3016 (1978).

negotiator Paul Warnke that the Administration was considering submitting SALT II to Congress as a Congressional-Executive agreement attracted the attention of key Senators.\(^5\) These Senators immediately went on the political offensive, and some Senators who supported SALT II called for Senate opposition to a resolution approving SALT II as a Congressional-Executive agreement in order to protect the Senate's institutional prerogatives.

Apparently fearing that a SALT II Congressional-Executive agreement would thus fail in the Senate, the Carter Administration decided not to submit SALT II to both houses as a Congressional-Executive agreement, but rather to the Senate exclusively as an Article II treaty.\(^6\) The Carter Administration did so for political reasons; this decision was not based on a legal interpretation or opinion.

The SALT II experience demonstrates that the political process is the forum for defining constitutional and institutional prerogatives when international agreements are approved by Congress. In contrast to the fate of the SALT I Interim Agreement, the executive branch, the Senate, and the House did not reach a political accommodation to conclude the SALT II agreement as a Congressional-Executive agreement. The Senate exercised its considerable political influence with the White House over the form of the agreement, and the White House acceded to the Senate's demands. The House does not appear to have participated in this political battle, and thus its interests were not vindicated by the final result. On the basis of these three deliberations, it seems entirely reasonable to conclude that arms control agreements, like other agreements, may be legitimately concluded by the President on the basis of congressional authority as an alternative to the Article II process.

### III. The Senate Record of Deliberations Regarding Arms Control Treaties

In this Part we examine the formal approval record and lay the em-


\(^{56}\) See Edward Walsh, Carter View of SALT Linked to Soviet Restraint, WASH. POST, Feb. 24, 1979, at A28 ("Last year, the White House deliberately encouraged speculation that a new SALT accord might be submitted to Congress as an executive agreement rather than as a treaty. But that idea provoked heavy congressional opposition and Carter later ruled it out.").

One critic of arms control agreements later somberly observed, "[in 1979], approval of the [SALT II] treaty was seen as so doubtful President Carter considered making the treaty into an Executive agreement. This tactic, however, was strongly opposed by the Senate leadership as inappropriate and rightly so. The authority and constitutional duty of the Senate were at stake." 132 CONG. REC. S9069 (daily ed. July 15, 1986) (statement of Sen. Quayle).
pirical basis for some of our intuitions and conclusions about the role of the Senate in the arms control treaty process. This Part will examine the record of Senate consideration of the fifteen nuclear arms control agreements to which the U.S. is a party and which have been concluded with Senate approval (many modern arms control agreements have been concluded as Presidential-Executive agreements). By examining the Senate’s debates and related committee action, we may get a better view of the Article II process and the role that the Senate has played. (This Article was written prior to ratification of the START Treaty in October, 1992.)

In arms control negotiations individual Senators have regularly participated as advisors or observers on the negotiating team. They have participated in the negotiation of the Antarctic Treaty, Limited Nuclear Test Ban Treaty, Outer Space Treaty, Environmental Modification Treaty, SALT II, INF, and START. In addition, there are two treaties (the Seabed Treaty and the Environmental Modification Convention) as to which Senator Pell, an influential member of the Foreign Relations Committee, has claimed credit for proposing the conclusion of a treaty on the points covered. The formal record unfortunately does not disclose the actual influence of Senators on the course of a negotiation. The executive branch no doubt has often viewed their participation as helpful in assuring eventual Senate approval. Our intuition is that individual Senators participating in the negotiation do not seem to have caused major changes in policy or negotiating positions, although their views are undoubtedly listened to with respect, and it seems likely that there are many cases where their expressed concerns are accommodated. For example, during the Nuclear Test Talks, thirty-four Senators sent a letter to the delegation urging the achievement of specific negotiating objectives. Those objectives were met and Senator Helms’s contribution was recognized by the chief U.S. negotiator.

More significantly, the Senate or Congress can have a major impact in shaping defense policy: by curtailing programs such as SDI, which in turn impacts arms control negotiations; and through legislation such as the Jackson amendment, which imposed significant political constraints on the SALT II negotiations. In addition, the formal record of Senate deliberations reveals a relatively clear and consistent pattern of concern over the effect of treaties on U.S. military preparedness, including concern over the ability of the United States to continue nuclear testing, and over the availability of nuclear weapons for NATO and for use in war. The record also reflects a strong distrust of the Soviet Union and the need to guard against its perfidy, especially in the repeated emphasis on verification. Moreover, some of the proposed reservations debated in the
Senator, such as that requiring on-site inspection in the Limited Test Ban Treaty (LTBT), were undoubtedly implicitly understood as a repudiation of dealing at all with the U.S.S.R. In this way the influence of the Senate has regularly reflected the influence of the conservative wing of the U.S. political spectrum. Although this influence has not usually been imposed in a formal sense, such as through required reservations to treaties, it has no doubt played a significant role in the preparation and evolution of U.S. negotiating positions. The Senate has also regularly expressed its views on questions regarding Constitutional prerogatives in the treaty-making process with respect to related developments, such as possible amendments to a treaty or Presidential-authorized national commitments. Those views supplement the dialogue described above in connection with section 33 of the Arms Control and Disarmament Act and the SALT I and II debates.

We should preface our discussion with a word on terminology. As noted at the beginning of the paper, the Senate does not formally ratify or approve treaties. Instead, it votes its advice and consent to the President's ratification of the treaty. The legislative vehicle through which the Senate typically acts is the resolution of ratification. In the following discussion, when Senators propose amendments, understandings, and reservations to a treaty, they are technically proposing alterations in the Senate's resolution of ratification.

A. The Antarctic Treaty

The first nuclear arms control agreement to which the United States became a party was the Antarctic Treaty. Senators Carlson and McGee served as congressional advisers to the U.S. delegation, and thus actually participated in the negotiations. Senator McGee later delivered a floor address relating his first-hand knowledge of the negotiations; this address was singled out for praise by Senator Fulbright. The treaty was signed on December 1, 1959 by the United States and eleven other countries, including the Soviet Union. The treaty was transmitted to the Senate on February 15, 1960. The main purpose of the treaty was to ensure that Antarctica (or any part of the continent) did not become the sovereign territory of any nation, and that the continent be dedicated to peaceful purposes. Article I of the treaty prohibited any military use of Antarctica; Article V prohibited "[a]ny nuclear explosions in Antarctica and the disposal there of radioactive waste material." Article IV of the treaty froze the ability of states to make claims of sovereignty regarding any part of the continent. The arguable national security implications of Ar-
ticle IV were the most contentious aspects of the ensuing Senate ratification debate. Interestingly, the positions taken by Senators regarding Article IV echo the later debates regarding more substantive arms control agreements.

The major issues which arose at the SFRC’s treaty hearings concerned the Soviet Union. Treaty opponents argued that the pact gave the Soviets something for nothing—the United States, they asserted, had a more legitimate claim to sovereignty in Antarctica as a result of extensive U.S. scientific investigation than did the Soviet Union. Treaty opponents also raised claims which foreshadowed later debates over strategic arms control verification, contending that the Soviets could not be trusted to live up to their commitments and that the Soviets might still one day use Antarctica as a secret military base. Finally, treaty opponents objected to the codification of Soviet access to Antarctica at all.

The Senate’s floor debate saw many of the same issues raised. In addition, Senator Engle made the argument that the treaty was inimicable to U.S. interests because the pristine and isolated Antarctic continent was a perfect place for U.S. nuclear testing and the disposal of American nuclear waste. During the floor debate, Senator Engle moved that the Senate delay its consideration of the treaty by six months. The Senate defeated the Engle motion 56-29. The Senate then approved its resolution of ratification by a vote of 66-21.

B. Limited Test Ban Treaty

The LTBT was signed on August 5, 1963, by the U.S., the U.K., and the U.S.S.R., and was then opened for the signature of all nations. The LTBT permanently prohibited all atmospheric, outer space, and underwater nuclear explosions. It was transmitted to the Senate on August 8, 1963.

The SFRC held joint hearings with the Senate Armed Services and Atomic Energy Committees in late August, 1963. Senators pressed Administration representatives for their views on whether the U.S. could continue to test and develop its nuclear weapons adequately without above ground detonations. Senators also pressed for assurances that the U.S. could verify Soviet compliance with the treaty. Finally, Senators who both supported and opposed more comprehensive restrictions on nuclear testing inquired as to whether the LTBT signalled that U.S. policy was now to pursue a comprehensive test ban treaty. The SFRC reported the treaty unanimously and without reservation to the full
Senate.\(^{57}\) Senate floor debate on the LTBT began in September, 1963, and the general debate covered the same issues which had been raised at the hearings. The Senate then considered many proposed reservations and amendments.

Senator Russell proposed an amendment to the resolution of ratification which would have provided that any subsequent amendment to the treaty must be approved by two-thirds of the Senate. The Russell amendment was offered out of concern that Article II of the treaty, which provided the means for the signatory parties to amend the treaty, might have allowed amendment of the treaty by either Presidential-Executive agreement or Congressional-Executive agreement.\(^{58}\) After debate, Senator Russell proposed an alternative to his reservation in the form of adding a preamble to the Senate's resolution of ratification underlining the Senate's Article II advice and consent function.\(^{59}\) This proposal represented an attempt to satisfy the concerns of Senators regarding the conclusion of amendments to the LTBT by other than the Article II process, but in a less direct and intrusive manner than a reservation, amendment, or understanding. The Senate approved the Russell preamble 79-9.\(^{60}\)

Senator Tower proposed two reservations. One would have required the President to delay depositing the treaty's instrument of ratification until the treaty had been revised to provide for on-site inspection.\(^{61}\) The Senate defeated the on-site inspection reservation 76-16.\(^{62}\)

The other Tower reservation would have required the President to delay depositing the treaty's instrument of ratification until he determined that the U.S.S.R. had paid its U.N. dues. Senator Miller also offered a reservation which would have delayed U.S. ratification of the treaty until the U.S.S.R. paid its U.N. debt.\(^{63}\) He withdrew his amendment after debate, and the Senate instead voted on Senator Tower's second reservation. The Senate defeated the U.N. dues reservation by a vote of 82-11.\(^{64}\)

Senator Goldwater proposed a reservation which would have delayed U.S. ratification "until the [U.S.S.R.] has removed all nuclear

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58. Id. at 16,847-49.
59. Id. at 17,745.
60. Id. at 17,755.
61. Id. at 17,455.
62. Id. at 17,734.
63. Id. at 17,730.
64. Id. at 17,732.
weapons, all weapons capable of carrying nuclear warheads, and all Soviet military and military technical personnel from Cuba;" the Goldwater reservation further provided that U.S. ratification should be delayed until the completion of an inspection of Cuba verifying the total Soviet pullout. The Goldwater reservation was debated on the Senate floor, with opponents arguing that it was totally irrelevant to the question of above ground nuclear testing, and possibly not even germane under Senate rules. Goldwater told the Senate, "[i]t has been said that the reservation which I propose is not germane to the treaty. I say that the comment is not germane to my reservation." The Senate rejected the Goldwater reservation 75-17.

Senator Mundt proposed an amendment to the resolution of ratification which expressed the sense of the Senate that with regard to future international agreements to which the U.S. is an original signatory, when such agreements "become effective only when ratified by certain specified parties, it should be the position of the United States that no other country should be permitted to sign or accede to such treaty or amendment until it shall have been ratified by such specified parties." The intent of the Mundt amendment was to free the Senate from "the argument that to reject a treaty already signed by so many [nations] would virtually be considered by them as an act of bad faith and a breach of international understanding." After making his speech, Senator Mundt withdrew his amendment.

The Senate then considered Senator Long's reservation which asserted that "the treaty does not inhibit the use of nuclear weapons in armed conflict" (the reservation was actually offered by Senator Tower at Senator Long's request). Senator Tower argued that a perhaps inadvertent, but serious, ramification of the LTBT would be a prohibition on the use of nuclear weapons during times of war, since, presumably, nuclear weapons used during combat would be exploded above ground.

Many senators asserted that the treaty did no such thing; the treaty, they claimed, was understood by the parties to cover peacetime nuclear testing, and was not relevant to wartime use. Furthermore, many opponents of this reservation contended that, under international law, treaties

65. Id. at 17,713.
66. Id. at 17,716-19.
67. Id. at 17,714.
68. Id. at 17,723.
69. Id. at 17,723.
70. Id. at 17,727-28.
71. Id. at 17,729.
72. Id. at 17,734.
such as the LTBT were suspended during wartime. As the debate was winding down, Senator Holland offered an amendment to change the nature of the proposal before the Senate from a reservation to an understanding; the Senate accepted the Holland proposal. The Senate then tabled the understanding. The Senate approved the LTBT’s amended resolution of ratification 80-19.

C. Outer Space Treaty

The Outer Space Treaty (OST) was signed by sixty nations, including the United States and the Soviet Union, on January 27, 1963. The main purpose of the OST was to set aside space for peaceful uses; the treaty specifically prohibited the placement of nuclear weapons in space. It was transmitted to the Senate on February 7, 1967.

Senators Aiken and Gore served as advisers to the U.N. Committee on Peaceful Uses of Outer Space, the multinational body which formulated the policy proposals which led to the treaty. Senators Church and Case served on the U.S. delegation to the General Assembly which voted to approve the OST and recommend it to member nations. According to U.N. Ambassador Arthur Goldberg, “in the very negotiations themselves I was materially benefitted by having two members of Congress on the House side, Chairman George Miller of the Committee on Science and Astronautics, and Representative James Fulton, come to Geneva, and they participated in the negotiations which culminated in the formulation of this treaty.”

SFRC consideration of the OST was by and large noncontroversial. The only remotely contentious issue was whether the treaty might limit transmissions from U.S. communications satellites; there were potential first amendment and national security components to this issue. Senator Gore expressed his interest in a Senate reservation which would have made explicit the Senate’s concerns relating to this satellite communications issue, but no such reservation was ever formally proposed. SFRC reported the treaty unanimously and without reservation on April 14, 1967. The Senate approved the resolution of ratification of the treaty 88-0 after a cursory debate.

73. Id. at 17,741-45.
74. Id. at 17,745.
75. Id. at 17,832.
76. Treaty on Outer Space: Hearings Before the Committee on Foreign Relations, 90th Cong., 1st Sess. 7 (1967).
77. Id. at 33.
78. 113 CONG. REC. 10,687 (1967).
D. Latin American Nuclear Free Zone, Protocol II

The Treaty of Tlatelolco created a nuclear free zone in Latin America and prohibited parties from acquiring nuclear weapons. There are two protocols to the treaty. Additional Protocol I was intended to be signed by states which had territories within Latin America; their agreement to Protocol I required them to abide by the treaty's nuclear free provisions. Additional Protocol II was intended to be signed by the world's nuclear weapon states; it requires them not to contribute to the violation of the treaty and not to threaten or use nuclear weapons against Latin American nations. (The U.S. understood Protocol II to extend its obligations to the territories of Protocol I signers.)

The United States signed Protocol II in April, 1968; its submission to the Senate was delayed while the executive branch waited to see whether the parties to the treaty understood and accepted the understandings issued by the U.S. when it signed the protocol (these understandings related to issues such as transit rights). Protocol II was submitted to the Senate in August, 1970.

SFRC held short, noncontentious hearings. At these hearings, Nixon Administration representatives requested that the Senate include certain understandings in its resolution of ratification. Senators did not oppose the Administration's proposal. SFRC reported Protocol II to the full Senate 13-0 on March 30, 1971.

In its resolution of ratification, the full Senate incorporated the understandings requested by the Administration. These understandings expressed the following U.S. positions:

1) the U.S. did not accept the unilateral territorial claims of the treaty parties relating to their territorial seas;
2) the U.S. reserved military transit and transport privileges;
3) the pledge of nonuse of nuclear weapons against Latin American nations would be considered void in the event of an attack by a Latin American nation party which received assistance from a nuclear weapon state (reflecting U.S. concerns about Cuba); and
4) the U.S. could carry out peaceful nuclear explosions on behalf of Latin American nations party to the treaty. 79

The Senate approved the resolution of ratification 70-0. 80

80. Id. at 10,745.
E. Latin American Nuclear Free Zone, Protocol I

As noted above, Protocol I required nations with territorial possessions in Latin America to apply the nuclear free provisions of the treaty to those territories. The Carter Administration signed Protocol I on May 26, 1977. At the time of signing, U.S. territories covered under Protocol I included Puerto Rico, the U.S. Virgin Islands, Guantanamo, and the Panama Canal Zone (which would cease to be U.S. territory for the purposes of Protocol I upon its return to Panama under the Panama Canal Treaty).

The SFRC conducted hearings on Protocol I on August 15, 1978, and on September 15 and 22, 1981. The Carter Administration recommended that the Senate incorporate the following understandings as part of its resolution of ratification:

1) The understandings incorporated into the Senate's resolution of ratification for Protocol II should apply here as well;
2) U.S. transit rights would not be interfered with by U.S. ratification of the Protocol; and
3) the Protocol does not affect U.S. positions on freedom of the seas issues or passage rights.\(^81\)

While the Carter Administration submitted Protocol I to the Senate for its advice and consent in 1978, the Senate did not approve its resolution of ratification until the early days of the Reagan Administration in 1981. According to Senator Percy, the Senate delayed its approval “not because of any substantive problem with the protocol itself, but because of a dispute between the committee and the executive branch regarding access to a letter from the National Security Council to the Joint Chiefs of Staff. . . . [and] that dispute is clearly moot with the change in Administration.”\(^82\) The Senate approved the resolution of ratification 79-0.\(^83\)

F. Nuclear Nonproliferation Treaty

The Nuclear Nonproliferation Treaty (NPT) involved a grand bargain between nuclear weapons and non-nuclear weapons states. Under the NPT, non-nuclear states agreed to forego the development, production, and acquisition of nuclear weapons; the nuclear nations in turn agreed to provide assistance with peaceful nuclear programs. The NPT provided for International Atomic Energy Association (IAEA) inspec-
tions of nuclear facilities. The NPT additionally required the nuclear states to agree to pursue arms control; nuclear states were also prohibited from transferring weapons technology to non-nuclear states.

The United States signed the NPT on July 1, 1968. During the negotiations there were extensive consultations with Congress.84

The SFRC held extensive hearings which delved into issues such as the spread and development of nuclear weapons technology throughout the world, the efficacy of IAEA safeguards, and the impact of the NPT on U.S. national security. SFRC voted to approve the NPT 14-0, with one member voting "present."

The full Senate began consideration of the NPT on March 7, 1969.85 The following issues were the subject of the most pointed debate and of various legislative proposals related to the Senate’s resolution of ratification. Immediately before the conclusion of the international negotiations, the U.S. and the U.N. Security Council issued statements which were later debated extensively in the Senate. In effect, the U.S. and Security Council declarations related that, in the event of the threat of aggression by a nuclear state against a non-nuclear signatory, immediate assistance would be sought from the Security Council. In the view of the SFRC (as expressed in its report), "the Security Council Resolution and the Security Guarantee declaration made by the United States in no way either ratify prior national commitments or create new commitments."

On the floor of the Senate, some Senators argued that these two declarations would in fact require the U.S. to come to the defense of a non-nuclear signatory in the event of aggression by a nuclear power. They argued that the U.S. statement was designed to encourage reluctant non-nuclear states to sign the treaty, and that the form of encouragement was a tacit pledge to come to their defense. Chairman Fulbright told the Senate that "I want to repeat ... that the committee has made it unmistakably clear in its report that the Security Council resolution in question and the U.S. declaration are separate and distinct from the Nonproliferation Treaty."87

Senator Ervin proposed a reservation to the resolution of ratification which would insure that the U.S. "does not obligate itself by this treaty to use its armed forces to defend any non-nuclear-weapon state or any member of the United Nations against any acts or threats of aggression

85. Id. at 5608.
86. Id. at 5738 (1969) (emphasis in original).
87. Id. at 5739.
An extended debate between Senators Fulbright and Ervin followed. The Senate tabled the Ervin reservation by a vote of 61-30. Senator Ervin made a second legislative proposal regarding the "commitment-to-defend" issue. This second proposal tracked the language of Ervin's first reservation and added the understanding that "this treaty does not affect in any way any obligation assumed by the United States under any other treaty or the Charter of the United Nations." The Senate defeated this understanding 69-25.

Some Senators questioned whether the NPT might adversely affect U.S. policies and responsibilities relating to NATO. A colloquy between Senators Spong and Fulbright addressed these issues; they contended that the NPT did not prohibit the U.S. from stationing nuclear weapons in NATO countries as long as the U.S. retained final control over their use. They also told the Senate that the NPT would not place any other restrictions on the ability of the U.S. or other NATO members to fulfill their alliance responsibilities.

Senator Tower proposed a reservation to the Senate's resolution of ratification which provided that the NPT not preclude "the provision of weapons or other materials for the establishment of nuclear defenses to regional organizations established under Article 52 of the Charter of the United Nations." Senator Tower was concerned that, in the event of a crisis, the U.S. would be prevented from providing allies (such as NATO members) with nuclear weapons. In response, Senator Fulbright argued that the McMahon Act already prohibited the U.S. from transferring control over nuclear weapons to other nations; that the NPT had a thirty day exit clause; and that, under both international law and common sense, all bets would be off in the event of a severe crisis or war anyway. The Senate defeated the Tower reservation 75-17.

Senator Dodd introduced an understanding that an attack against any country by a nuclear state party to the treaty would be considered a violation of the treaty. In essence, the Dodd understanding was offered as a response to the Soviet invasion of Czechoslovakia. Dodd's position was that non-nuclear nations signed the NPT in part out of a sense that

88. Id.
89. See memos at Id. at 5745.
90. Id. at 5893.
91. Id. at 6343.
92. Id. at 6344.
93. Id. at 6186-87.
94. Id. at 6194.
95. Id. at 6206.
96. Id. at 6208-09.
the nuclear nations would aid them in the event of aggression by other nuclear nations—or that, at least, in such circumstances, non-nuclear nations might require nuclear defenses. The Senate defeated the Dodd understanding 81-15.97

A second understanding offered by Senator Dodd provided that the U.S. would "deposit its instrument of ratification simultaneously with the Soviet Union, at a time to be agreed upon."98 The Senate defeated Dodd II 79-15.99

Senator Thurmond proposed an understanding which mandated that the "[t]reaty will be construed in accordance with the answers given by the United States in response to certain questions by other members of [NATO] . . . ."100 These answers indicated the understanding of the U.S. government (communicated to NATO allies) that the NPT would not interfere with U.S. NATO obligations, in particular those concerning nuclear weapons. For instance, although the NPT prohibits the "transfer" of nuclear weapons, the statements made to the NATO allies by the U.S. indicates the American understanding that what the NPT actually prohibits is the transfer of control of nuclear weapons. Under this logic, the U.S. intended to continue to transfer its nuclear weapons in Europe from the territory of one NATO nation to another without violating its understanding of the NPT. The Senate defeated the Thurmond understanding 77-17.101

Senators expressed the concern that the treaty's provisions regarding peaceful nuclear cooperation between nuclear and non-nuclear states could lead the U.S. to aid the commercial ventures of other nations and, in effect, aid the foreign competitors of U.S. firms. Senator Fulbright told the Senate that "the committee states its satisfaction with the assurances of the administration . . . that article V will not result in an open-ended subsidy of commercial interests."102 The Senate approved the resolution of ratification by a vote of 83-15.103

G. Seabed Arms Control Treaty

The Seabed Treaty prohibited the placement of nuclear weapons on the ocean floor. Submarines do not fall within the coverage of the treaty,
but nuclear mines anchored to the ocean floor do. According to Senator Pell, the treaty's genesis lies in a Senate resolution which he sponsored; this initiative was then promoted at the U.N., and Senator Pell served as a delegate to the U.N. body which voted to commend the treaty to members. Senator Mathias also served as a delegate to the U.N. Committee on Disarmament.

SFRC consideration of the treaty was pro forma, and the committee reported the treaty unanimously. Senate floor consideration was also pro forma; the Senate approved the resolution of ratification by a vote of 83-0.

H. ABM Treaty

The ABM Treaty, which limited U.S. and Soviet strategic defenses, was signed by President Nixon and Soviet leader Brezhnev on May 26, 1972. President Nixon transmitted the treaty to the Senate on June 13, 1972, and SFRC held hearings in June and July.

Senator Buckley proposed an understanding which provided that the failure to reach a more comprehensive SALT agreement in five years would constitute a basis for withdrawal from the ABM Treaty. Senator Fulbright countered that Buckley's proposal (like Senator Jackson's proposals) was based on the faulty premise that the Interim Agreement did not in fact provide for strategic parity. Senator Buckley withdrew his understanding after short debate. The Senate approved the resolution of ratification of the ABM Treaty by a vote of 88-2.

I. SALT I Interim Agreement

Senate floor consideration of the interim agreement was marked by Senator Jackson's and the leadership's constant jockeying regarding the possibility of a filibuster. The Senate finally voted for cloture 76-15.

Senator Jackson offered an amendment to the resolution of ratification which expressed the view of Congress that were a more complete strategic offensive arms agreement not achieved within the five years of the interim agreement, and were the survivability of the strategic deterrent forces of the United States to be threatened as a result of such failure, this could jeopardize the supreme national interests of the United States... Congress... urges and

104. 118 CONG. REC. 3953 (1972).
105. Id. at 3958.
106. Id. at 3958.
107. Id. at 26,701.
108. Id. at 26,770.
109. Id. at 30,622.
requests the President to seek a future treaty that . . . would not limit the United States to levels of intercontinental strategic forces inferior to the limits provided for the Soviet Union . . . . \textsuperscript{110}

The Jackson amendment also expressed the view of Congress that the achievement of a more comprehensive arms control agreement was dependent upon a vigorous American research and development effort. Jackson's proposal reflected his assessment that the interim agreement provided for inequitable levels of U.S. and Soviet strategic forces, and that future agreements should assure equality in every respect of the permissible superpower arsenals. The debate surrounding this amendment crystallized the lurking conservative opposition to detente, and the ultimate adoption of the Jackson amendment no doubt had a significant conservative effect on U.S. arms control policy.

Senator Hughes offered an amendment to Jackson's amendment, which provided that the achievement of a more comprehensive arms control agreement was also dependent upon "the preservation of longstanding U.S. policy that neither the Soviet Union nor the United States should seek unilateral advantage by developing counter-force weapons which might be construed as having a first-strike potential." \textsuperscript{111}

Senator Muskie offered two amendments to the Jackson amendment which would have stricken the Jackson amendment's reference to "inferior" levels of strategic forces and instead pledged the U.S. to seek an agreement which would maintain "an overall equality" measured by a variety of criteria. \textsuperscript{112} The Senate rejected the first Muskie amendment 55-35. \textsuperscript{113} Senator Fulbright offered a substitute to the Jackson amendment providing that "Congress supports continued negotiations to achieve [arms control agreements] on the basis of overall equality, parity, and sufficiency, taking into account" various factors. \textsuperscript{114} The Senate defeated the Fulbright substitute 48-38. \textsuperscript{115} Senator Symington offered an amendment to the Jackson amendment which would have removed the word "intercontinental." The Senate defeated the Symington amendment 51-38. \textsuperscript{116} The defeat of these liberal amendments clearly signalled the strength of conservative skepticism about the direction set by the President in arms control negotiations.

Senator Javits offered a cosmetic amendment to the Jackson amend-
ment which was accepted by voice vote. The Senate then approved the Jackson amendment 56-35. The requirement of equal limits no doubt significantly constrained U.S. negotiating positions.

Senator Mansfield offered an amendment to the resolution of ratification announcing that Congress endorsed the U.S.-Soviet Declaration of Basic Principles of Mutual Relations. This declaration was signed by Nixon and Brezhnev when they signed the ABM Treaty and the Interim Agreement, and foreshadowed the decade of detente. The Senate rejected Senator Mansfield's motion to table his own amendment 52-31, and then approved the Mansfield amendment 84-1.

Senator Saxbe proposed an amendment expressing the view of Congress that the U.S. should not seek to develop first-strike weapons and that the U.S. and the Soviets should seek Senator Saxbe's vision of "strategic equality." Senator Brooke offered an amendment expressing the sense of the Congress that the fulfillment of the principles endorsed by the superpowers in the Mutual Declaration required that neither side pursue the development of a first-strike potential. The Senate accepted the Brooke amendment by voice vote. The Senate approved the joint resolution approving the interim agreement 88-2.

J. IAEA Safeguards Agreement

The IAEA Safeguards Agreement between the United States and the IAEA places American civilian nuclear facilities under the international safeguards of the IAEA. The agreement was approved by the IAEA on September 17, 1976, and was submitted to the Senate on February 9, 1978. The agreement served to implement the U.S. commitment stemming from the NPT to subject American civilian nuclear facilities to international inspection.

The SFRC reported the treaty unanimously to the full Senate with five understandings which, according to Senator Church, "will resolve [certain ambiguities about domestic implementation of the treaty] without touching U.S. obligations under the treaty."

The five understandings were as follows:

117. Id. at 30,638.
118. Id. at 30,649.
119. Id. at 27,930-31.
120. Id. at 29,499.
121. Id. at 29,727.
122. Id. at 28,675. The Senate does not appear to have acted on the Saxbe amendment.
123. Id. at 30,654.
124. Id. at 30,665-66.
125. 126 Cong. Rec. 18,487 (1980).
1) the agreement provided that the president should notify the IAEA of his determination that a given nuclear facility does not have a significant national security function and thus may be subject to inspection; the first understanding required the president to notify Congress as well, and gave Congress a sixty day period within which to pass a resolution of disapproval; 
2) the President shall consult with industry in advance of determining which facilities should be declared off-limits in order to protect industrial interests; 
3) a formal interagency mechanism shall be established to set and coordinate relevant policy; 
4) in the event that the NRC (an independent agency) and the administration (the State Department in particular) could not agree on policy, the view of the Administration shall prevail; 
5) "the Agreement shall not be construed to require the communication to the [IAEA] of 'Restricted Data' controlled by the provisions of the Atomic Energy Act of 1954."126

The Senate approved the agreement 90-0.127 The legal effect of these understandings, which deal with domestic matters related to, but not part of, the treaty, does not seem to have been discussed.

K. Nuclear Materials Convention

The 1980 Nuclear Materials Convention establishes international standards for the shipment and storage of nuclear materials; the convention grew out of concerns about international terrorism. The Senate approved this multilateral agreement 98-0 after pro forma debate.128

L. Threshold Test Ban Treaty and Peaceful Nuclear Explosions Treaty

The Threshold Test Ban Treaty (TTBT) was signed by the U.S. and the Soviet Union in 1974; it restricted the superpowers from conducting nuclear tests over 150 kilotons. The Peaceful Nuclear Explosions Treaty (PNET) was completed in 1976; it was intended to prevent the superpowers from surreptitiously gaining testing knowledge by conducting so-called peaceful nuclear explosions (neither side has conducted a peaceful nuclear explosion for nearly twenty years), and provided for verification of the yields of these explosions. President Bush and Soviet leader

126. Id. at 18,486.
127. Id. at 18,494.
Gorbachev signed new verification protocols for the TTBT and PNET at their June, 1990 Washington summit, and the treaties were then submitted to the Senate.

The Reagan Administration had opposed implementation of the two agreements for many years, but in 1986 announced its intention to find an appropriate solution to the verification concerns of conservatives. SFRC held hearings on the treaties in 1987, and "ordered [them] reported with a reservation providing for a presidential certification on verification." The Senate added this condition at the request of President Reagan.

Senator Helms then initiated a letter to the Administration recommending that negotiators at the nuclear testing talks attempt to gain Soviet agreement on certain intrusive verification techniques. In all, thirty-four senators signed the Helms letter, and endorsed its call for verification through the CORRTTEX system, thus effectively derailing further Senate consideration of the agreements.

In 1991 the SFRC held hearings following the conclusion of the new verification protocols. At these hearings, in an apparent reference to the Helms letter, ACDA Director Ronald Lehman commented,

I believe that when this committee completes its work it will be able to report that we set out to achieve two verification protocols of the highest quality and that we were successful in that endeavor. This was not done in isolation from the legislative branch. Rather, it was done with the closest consultations.

The verification protocols satisfied the stringent verification requirements requested in the Helms letter.

Before the SFRC reported the treaties, Chairman Pell asked ACDA Director Lehman to confirm that:

Your testimony in explanation of the meaning of the treaties and the obligations they entail, along with that of other Executive branch witnesses and materials submitted for the record, can be regarded as authoritative, and that the Senate can expect the Executive branch to regard itself as bound to interpret and implement the Treaties in accord with these representations without the need for the Senate to incorporate such interpretations in its resolution of ratification.

According to Senator Nunn, Mr. Lehman replied satisfactorily to each of these concerns.

133. Id. at S13,711.
The SFRC reported a resolution of ratification for the TTBT which included a declaration. According to the resolution of ratification, the Senate gave its advice and consent to the TTBT subject to —

I. The declaration that to ensure the preservation of a viable deterrent there should be safeguards to protect against unexpected political or technical events affecting the military balance . . . as follows:

Safeguard "A"
The conduct . . . of nuclear test programs . . .

Safeguard "B"
The maintenance of modern nuclear laboratory facilities and programs in theoretical and exploratory nuclear technology . . .

Safeguard "C"
The maintenance of the basic capability to resume nuclear test activities prohibited by treaties should the United States cease to be bound to adhere to such treaties.

Safeguard "D"
. . . research and development programs to improve our treaty monitoring capabilities and operations.

Safeguard "E"
. . . a broad range of intelligence gathering and analytical capabilities and operations . . .

II. The declaration that . . . the United States shares a special responsibility with the Soviet Union to continue the bilateral Nuclear Testing Talks to achieve further limitations on nuclear testing . . .134

The Senate approved the two treaties 98-0.135

M. _Environmental Modification Treaty_

The Environmental Modification (or "Enmod") treaty prohibits states from "engag[ing] in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party" (Article I). The treaty does not prevent the use of environmental modification techniques for peaceful purposes.

Senator Pell stated that the treaty resulted from another initiative by him. According to Assistant Secretary of State Thomas Pickering,

This convention . . . resulted in large part from the action by the Senate in July 1973 in adopting Senate Resolution 71 — which Senator Pell had introduced the year before . . . Senator Pell also participated in the negotiating process at the Conference of the Committee on Disarmament and at the United Nations which led to the successful conclusion of the convention and the recommendation by the General

134. _Id._ at S13,767-68. The Office of the Secretary of Defense endorsed the safeguards declaration. _Id._ at S13,712.
135. _Id._ at S13,767.
Assembly that it be opened for signature. This is an excellent example of a constructive initiative in the legislative branch leading to a useful outcome in the field of foreign affairs.\footnote{136}

The SFRC heard testimony regarding the treaty on October 3, 1978 and May 10, 1979. The only opposition to the convention presented to the SFRC came from U.S. environmental groups, which favored strengthening the terms of the treaty. James Barnes, in testimony given as the representative of a coalition of environmental groups, suggested that the Senate incorporate the following understanding into its resolution of ratification:

The Senate takes note of the assurance provided by the Secretary of State that the present Administration will begin [within six months of ratification] a review of the Convention . . . . It is the sense of the Senate that further steps should be considered by the U.S. Government . . . which would make the Convention more effective . . . .\footnote{137}

Assistant Secretary Pickering and Senator Pell both told Mr. Barnes that, in their view, attaching an understanding or reservation to the Senate's resolution of ratification would be inappropriate and could lead to needless international complications and confusion. They contended that a better means to make the statement in question would be to include it in the committee's report.\footnote{138} The Senate approved the resolution of ratification for the convention after a pro forma debate by a vote of 98-0.\footnote{139}

\textit{N. INF Treaty}

The SFRC and SASC held extensive hearings on the INF Treaty in January and February, 1988. A persistent issue involved whether the Administration was certain of the number of SS-20s in the Soviet arsenal, and whether government estimates of the number of warheads which SS-20s could carry had been accurate over the past decade.

Senator Helms pressed Administration representatives on the issue of whether the treaty provided for the destruction of warheads, rather than only missiles, and focused on the fear that the Soviets could reuse their INF warheads. As he told Ambassadors Glitman and Kampelman, "[a] missile is the carrying case and the warhead is the thing that goes 'boom,' and kills you. A missile itself does not kill you unless it falls on

\footnotesize{136. \textit{Environmental Modification Treaty: Hearings Before the Comm. on Foreign Relations,} 95th Cong., 2d Sess. 22-23 (1978).}

\footnotesize{137. \textit{Environmental Modification Techniques: Hearing Before the Comm. on Foreign Relations,} 96th Cong., 2d Sess. 13 (1979).}

\footnotesize{138. \textit{Id.} at 20-21.}

\footnotesize{139. \textit{125 CONG. REC.} 33,818 (1979).}
you and cracks your head open." The ambassadors responded that while parts of warheads would be destroyed under the terms of the treaty, to safeguard each side's bomb designs and to protect the environment, the fissionable materials and certain other components would not be destroyed. As part of his overall concern that the Soviets might cheat on the agreement, Senator Helms told his SFRC colleagues that he "filed in the Senate an amendment that would require the United States to withdraw from this treaty in the event of a major violation by the Soviet Union."

Former Assistant Secretary of Defense Richard Perle recommended that SFRC consider certain amendments and reservations to the treaty which he assured the committee would not be killer amendments, but rather would be helpful clarifying amendments. For instance, Perle argued, "[a] reservation that states simply that article 14 [of the treaty, which deals with noncircumvention] entails no obligations, not otherwise specified elsewhere in the treaty . . . could be readily accepted by [the Soviets]." More significantly, Perle recommended that the committee adopt an amendment which would permit non-nuclear ground-launched cruise missiles (GLCMs).

On February 22, Senator Helms wrote a letter to President Reagan in which he threatened to delay the Senate's confirmation of William Burns to be the new director of ACDA unless, among other demands, the Administration provided him with an ACDA study on U.S. INF verification capabilities. One week later, the Administration and Helms reached an agreement whereby the Administration acceded to Helms's demands and Helms agreed to allow Burns's nomination to go through.

Senator Pell noted at the beginning of the SFRC's first markup session that the committee potentially faced thirty-nine amendments and four conditions.

Senator Helms offered two amendments which would have exempted conventionally-armed GLCMs from coverage in the treaty; most arms control experts agree that it would be impossible to distinguish between conventional and nuclear cruise missiles without actually physically examining the warhead in question. The committee defeated the

141. Id. at 120-23.
142. Id. Part 3 at 3.
143. Id. Part 3 at 7.
145. INF Treaty, supra note 140, Part 6 at 1.
amendment 12-3.\textsuperscript{146}

Senator Helms considered offering an amendment which would have provided that remotely-piloted vehicles did not fall under the terms of treaty,\textsuperscript{147} and one which would have provided that "hypervelocity glide vehicles" were not covered by the treaty.\textsuperscript{148}

Senator Helms considered offering another amendment which would have changed the upper limit of missile range covered in the treaty from 5,500 km to 7,000 km.\textsuperscript{149} Senator Helms offered an amendment which would have provided that the Soviet Scud-B (which had an estimated range of 300 km, below the INF Treaty threshold of 500 km) was an INF missile and hence covered.\textsuperscript{150} The committee defeated the amendment 12-2.\textsuperscript{151}

Senator Pressler offered an amendment which would have prevented the President from bringing the treaty into force unless he certified that there was parity between U.S. and Soviet conventional forces in Europe; the committee voted against the amendment 15-2.\textsuperscript{152} Senator Pressler offered a revised version of this amendment which would have prevented the President from bringing the treaty into force until he certified that whatever imbalances in U.S. and Soviet forces did exist would not impair NATO security; the committee defeated the second Pressler amendment 15-2.\textsuperscript{153} Senator Pressler then offered another amendment which would have prevented the President from bringing the treaty into force until he certified that the Soviet Union was in compliance with the Helsinki Final Act; the committee defeated the amendment 11-2.\textsuperscript{154}

Senator Helms considered proposing an amendment which would have asserted that the U.S. retained the right to supply Israel with non-nuclear intermediate-range missile assistance.\textsuperscript{155} Senator Helms proposed an amendment which would have asserted that the treaty banned the flight-testing of ICBMs at INF ranges.\textsuperscript{156} The committee defeated the amendment 14-2.\textsuperscript{157}

Senator Helms offered an amendment which would have required
the President to certify the precise number of SS-20s in the Soviet arsenal; the committee defeated the amendment 15-2.158

Senator Murkowski considered offering an amendment declaring the sense of the Senate that any START treaty should preserve the non-nuclear cruise missile option for NATO.159

The committee voted to report the INF Treaty's resolution of ratification by a vote of 17-2.160

The Senate's floor debate on the INF Treaty began on May 17, 1988, and was by far the most active legislative debate of any of America's arms control agreements. The following discussion does not address the Senate's debate of the treaty interpretation issue, which is discussed in Part IV.

At the outset of the debate, Senator Helms moved that Senate consideration of [the INF Treaty] is not in order and that the document cannot be properly before the Senate because it is not signed by a person authorized to bind the Soviet state, but is, instead, signed by a leader of a political party in a foreign state [Mikhail Gorbachev].161

The Senate defeated the Helms motion 91-6.162

Senator Symms proposed an amendment which provided, according to Senator Symms, that "the treaty does not go into effect until the President can report to the Congress and verify that all Soviet arms control violations have been corrected and the Soviets are back in compliance."163 Because the Symms amendment was divided into five parts, each dealing with a separate treaty obligation, the Senate took five votes: 85-11, 87-10, 86-11, 82-15, 89-8, to defeat the Symms amendment.164

Senator Helms proposed (and later withdrew) an amendment to correct typographical errors in the treaty text; Senator Lugar argued that international law and the rules of diplomacy provided for the ability of states to change such errors.165

Senator Humphrey offered an amendment which would have delayed the treaty from entering into force until NATO had increased its stockpiles of ammunition and fuel.166 The Senate defeated the amend-

158. Id. Part 6 at 80-81, 99-100.
159. Id. Part 6 at 124-25.
160. Id. Part 6 at 201.
162. Id. at S6083-84.
163. Id. at S6283.
164. Id. at S6317-19.
165. Id. at S6322-24.
166. Id. at S6325.
Senator Helms offered an amendment which would have required the President to certify the number of SS-20s in the Soviet arsenal before the treaty could take effect. The Senate voted to table the Helms amendment 81-13.

Senator Wallop offered an amendment which he contended would correct a drafting error in the treaty which arguably permitted the Soviets to produce INF missile stages as part of the ICBM production process. The Senate voted to table the Wallop amendment 68-26.

Senator Humphrey offered an amendment delaying the treaty from taking effect until the U.S. and the Soviet Union had ratified a START treaty. The Senate defeated the amendment 81-5.

Senator Helms proposed an amendment to the treaty itself requiring the destruction of INF warheads.

The Senate leadership introduced a cloture motion, prompted by concerns that Senate debate on the treaty would not end before the pending Reagan-Gorbachev summit.

Senator Helms proposed an amendment to the treaty itself providing that "the provision of materially misleading and false data . . . between the Parties . . . or any other material breach of this Treaty . . . shall immediately give the other Party the right to terminate." The Senate defeated the amendment 89-9.

Senator Hollings proposed an amendment to the resolution of ratification providing that:

The Senate's advice and consent . . . is subject to the condition that . . . the President shall obtain the agreement of the [U.S.S.R.] to the following reservation:

References in the Treaty to ground-launched cruise missiles [GLCMs] shall be deemed to be references only to [nuclear-equipped GLCMs].

The Senate rejected this amendment 69-28.

167. Id. at S6342.
168. Id. at S6401.
169. Id. at S6422.
170. Id. at S6415.
171. Id. at S6423.
172. Id. at S6436.
173. Id. at S6441.
174. Id. at S6503. The Senate does not appear to have acted on this amendment.
175. Id. at S6503.
176. Id. at S6565.
177. Id. at S6573-74.
178. Id. at S6576.
179. Id. at S6610.
Senator Murkowski proposed an amendment to the resolution of ratification declaring the view of the Senate that: (1) the U.S. should rely on its own national technical means of verification in a future START treaty, rather than on cooperative verification procedures; (2) START should not contain further restrictions on conventional cruise missiles; (3) the President and Congress should agree on the character of and funding for U.S. strategic forces prior to any START agreement.180 The Senate agreed to the nonbinding Murkowski amendment by voice vote.181

Senator DeConcini offered an amendment to the resolution of ratification underlining the Senate’s view that the Soviets should live up to international human rights standards; the Senate adopted the amendment by voice vote.182

Senator Warner proposed an amendment to the resolution of ratification conditioning the Senate’s advice and consent on the President’s obtaining the agreement of the Soviet Union that certain diplomatic notes signed by the treaty negotiators be as binding as the treaty.183 The Senate approved this amendment 96-0.184

Senator Helms proposed an amendment to the resolution of ratification (cosponsored by Senators Byrd, Dole, and Simpson) which would have declared the view of the Senate that the U.S. would pursue START and CFE agreements guided by certain principles, including close consultations with NATO, close consultations with the Senate, and an emphasis on strict verification regimes. The amendment also included that arguably contradictory declarations that:

(e) In accordance with the Constitutional process of the United States, the United States shall . . . not be bound [by] any treaty . . . until ratification thereof pursuant to the advice and consent of the Senate;
(f) . . . any joint declaration reached with the [U.S.S.R.] for the negotiation of the treaties contemplated hereby, and such framework itself . . . shall not constrain any military programs of the United States unless otherwise provided for in accordance with Section 33 of the Arms Control and Disarmament Act.185

None of the sponsoring Senators addressed whether section (f) implied that the U.S. and Soviets could reach an arms control framework which could be brought into force through a Congressional-Executive agreement.

180. Id. at S6613.
181. Id. at S6616.
182. Id. at S6616, 6624.
183. Id. at S6701.
184. Id. at S6723-24.
185. Id. at S6786.
Interestingly, Senator Gore proposed a second-degree amendment to this amendment which omitted any reference to section 33. Senator Gore told the Senate:

I have no objection . . . to reiterating the provisions of existing law. But I submit that the proposed [Helms] amendment is substantially broader in the scope of its language than is the law to which it refers. There is a nontrivial difference between the amendment’s stricture that the President may ‘not constrain any military programs of the United States,’ and the law’s formulation which is limited to actions that would ‘disarm or reduce or limit the Armed Forces or armaments of the United States.’

Senator Gore proceeded to argue that, in the hypothetical instance of a President proposing a moratorium on nuclear testing, such a moratorium (which would “arguably” not amount to such a limitation on U.S. armaments) would not fall within the coverage of section 33, but would fall within the terms of the Helms amendment. Senator Cranston then withdrew his second degree amendment from consideration. The Senate rejected a motion to table this Helms amendment 60-38. Senator Helms later offered a modified version of his amendment (which retained the language quoted above), and produced a letter from Legal Adviser Sofaer concerning the amendment. Senator Helms then made the following statement:

[There have been press reports suggesting that some sort of framework for a START agreement will in fact, be announced in Moscow during the summit. The [amendment] also makes clear that any such framework shall be viewed by the U.S. Government as advisory only with respect to negotiations only and will not constitute a commitment nor constrain [sic] any military program of the United States unless specifically provided for in accordance with section 33 of the Arms Control and Disarmament Act. In other words . . . a clear-cut statute enacted subsequent to the declaration, or a ratified — a ratified — treaty.]

The Senate approved the amendment 94-4.

The Helms amendment may have simply been the product of hasty, last-minute draftsmanship. Still, the amendment and the accompanying debate indicate Senate acceptance of the proposition that some types of arms control limitations, for instance, those outlined in negotiating frameworks, may be given the force of law through the procedure out-

186. Id. at S6787.
187. Id. at S6787-88.
188. Id. at S6791.
189. Id. at S6793.
190. Id. at S6897.
191. Id. at S6898.
192. Id. at S6902.
lined in section 33—namely, Congressional-Executive agreements. Senator Cranston's stated reasons for omitting reference to section 33 in his second degree amendment do not undermine this reading of the Senate's action, and Senator Helms's floor statement supports this reading.

Senator Wallop offered an amendment to the resolution of ratification regarding U.S. policy in the event of Soviet noncompliance with the INF Treaty, and requiring the President to report regularly to Congress on such matters. The Senate tabled the amendment 66-30.

Senator Wilson proposed an amendment to the resolution of ratification providing the following:

CONDITION. — The United States shall not be bound to any interpretation of this Treaty that is not equally binding on the Soviet Union under applicable international law.

The Senate voted to table the Wilson amendment 53-45.

Senator Pressler offered an amendment to the resolution of ratification conditioning U.S. ratification of the treaty on the President's certification that the Soviet Union was in compliance with the Helsinki Final Act; the Senate tabled the amendment 86-10.

Senator Symms offered, and then withdrew, an amendment relating to how OSIA personnel should be counted within the context of the defense budget.

Senator Dole offered an amendment to the resolution of ratification requiring the President to certify that the U.S. and the Soviet Union have reached an agreement regarding the production of ground-launched ballistic missiles which could have similarities to INF missiles; the Senate accepted the amendment by voice vote.

Finally, Senator Helms proposed an amendment providing for the withdrawal from Europe of U.S. dependents, the limitation of U.S. troops' tours of duty in Europe, and the phased withdrawal of U.S. forces from Europe after implementation of the treaty, out of concern that as a result of the treaty the Soviets would overrun Western Europe. The Senate rejected the amendment by voice vote. The Senate approved the INF Treaty's resolution of ratification 93-5.

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193. Id. at S6794.
194. Id. at S6877.
195. Id. at S6805.
196. Id. at S6809.
197. Id. at S6878, S6881.
198. Id. at S6881-83.
199. Id. at S6883-84.
200. Id. at S6902-04.
201. Id. at S6937.
The Conventional Armed Forces in Europe (CFE) Treaty marked the culmination of nearly two decades of negotiations concerning the levels of non-nuclear armaments in Europe. By the time the United States and twenty-one other nations had signed the completed treaty on November 19, 1990, the Warsaw Pact had begun to disintegrate and the Soviet threat had all but ceased to exist.

President Bush submitted the treaty to the Senate for its advice and consent on July 9, 1991; after the United States and the Soviet Union reached an agreement in June, 1991 resolving conflicts concerning discrepancies in Soviet-supplied data on Soviet force levels, Soviet interpretation of counting rules, and the pre-ratification transfer of Soviet weapons from Eastern Europe to positions east of the Urals.

SFRC held hearings on the CFE Treaty and unanimously approved a resolution of ratification on November 19, 1991. The resolution of ratification contained five conditions binding upon the executive branch and four declarations which expressed the sense of the Senate.

1. Conditions

   a. Treaty-Limited Equipment

The Soviet Union insisted in early 1991 that certain equipment assigned to its naval forces was not covered by Article III of the treaty. All other parties to the treaty disputed this Soviet position. The conflict was resolved at a ministerial meeting attended by all the states parties on June 14, 1991. At this ministerial meeting, the Soviet Union made a legally binding commitment to act in accordance with the mainstream interpretation of the treaty with respect to these disputed naval forces; however, the Soviets were not required to repudiate their interpretation of Article III directly.

The SFRC attached a condition to the resolution of ratification providing that the United States "shall regard [Soviet actions inconsistent with the June 14, 1991 agreement] as equivalent under international law to actions inconsistent with the CFE Treaty."202 In its report, the SFRC stated that

   the committee intends to make clear that this side agreement has the same force and effect as the Treaty. . . . The committee believes there is no sound constitutional argument for not seeking Senate approval of 'side' agreements reached prior to final Senate consent to ratification, insofar as such agreements affect the obligations of parties to a treaty.

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before the Senate.\textsuperscript{203}

\textbf{b. Data}

The concern arose in the Administration and in the Senate in late 1990 and early 1991 that the Soviet Union had falsely declared the amount of treaty-limited equipment which was stationed in the treaty-covered zone. The Soviets later issued a political commitment regarding the number of forces which the Soviets would reduce, and the other parties to the treaty believed this political commitment adequately resolved the data dispute.

The SFRC attached a condition to the resolution of ratification which required the United States to “continue to seek clarification [of the actual number of forces] and . . . seek to obtain additional reductions [if the United States learns that a party had in fact underrepresented its holdings].”\textsuperscript{204} The committee stated in its report that “[a]lthough most administration officials believe that the treaty calls for calculating destruction requirements on the basis of each state’s declaration, the committee believes that if Soviet declarations are lower than actual holdings, the United States should seek to obtain additional reductions.”\textsuperscript{205}

\textbf{c. Equipment East of the Urals}

As political circumstances changed dramatically in 1989 and 1990, the Soviets withdrew large numbers of conventional forces from the European theater to positions within the Soviet Union and east of the Urals (and thus, out of the treaty-covered zone). In response to the expressed concerns of the United States and other parties that the withdrawn equipment could enable the Soviets to evade the substance and spirit of many CFE provisions, the Soviets issued a political commitment on June 14, 1991 to destroy much of this equipment and not to use it as a strategic reserve.

The SFRC attached a condition to the resolution of ratification providing that the United States “shall regard militarily significant actions inconsistent with the [June 14, 1991 Soviet statement] as potentially warranting a United States response . . . and, in the event of such actions, the President shall report to the Senate concerning the appropriate United States response.”\textsuperscript{206}

\begin{footnotes}
\item[205] SFRC CFE Report, supra note 203, at 70.
\end{footnotes}
d. Soviet Equipment Temporarily in the Baltics

The CFE Treaty was negotiated before the Baltic states regained their independence from the Soviet Union. As such, Baltic territory is treated as Soviet territory under the treaty. In response to the concerns of the United States and other parties, the Soviet Union agreed to a legally binding commitment to treat all Soviet equipment within the new states of Latvia, Lithuania, and Estonia as treaty-covered equipment.

The SFRC attached a condition to the resolution of ratification providing that the United States "shall regard actions inconsistent [with this Soviet commitment] as equivalent under international law to actions inconsistent with the CFE Treaty." 207 In its report, the SFRC stated its belief that this agreement sets an important precedent for addressing the creation of new states in the former Soviet Union. . . . [T]he committee intends to make clear that this side agreement has the same force and effect as the Treaty. . . . More generally, the committee strongly believes that the increasingly common executive branch practice of setting aside certain issues for 'side' agreements threatens to undermine the Senate's coequal role in the treaty-making process. Therefore, the committee intends as a matter of practice to continue to condition the Senate's consent to treaties on the understanding that so-called 'side' agreements have the same force and effect as the Treaty to which such agreements are related. 208

e. Area of Application and New States

The SFRC noted in its report that, whereas the Vienna Convention provides that, in the event of state secession, the new state must continue to abide by the treaty obligations of the former state, the Third Restatement of Foreign Relations Law provides that such a new state may opt not to be bound by its predecessor's obligations. Given the legal and political uncertainty at the time of the Senate's consideration of the CFE Treaty, the committee added a condition to the resolution of ratification which addressed the issue of state secession.

This condition provides that if a new state is formed in the treaty-covered zone and opts not to be bound by the treaty, the President:

(A) shall consult with the Senate regarding the effect on the Treaty of such developments;

(B) shall, if he determines that such state's holdings . . . are of such military significance as to constitute a changed circumstance affecting

207. Id.
the Treaty's object and purpose . . . [call an extraordinary conference] or undertake other appropriate diplomatic steps;
(C) shall, if he has made the determination described in subparagraph (B), submit for the Senate's advice and consent any change in the obligations of the states parties . . . that is designed to accommodate such circumstance . . . unless such change is a minor [administrative or technical] matter.\textsuperscript{209}

The committee stated in its report that it intended the phrase "changed circumstance" to refer to a situation in which either Ukraine or Byelorussia refused to be bound by the treaty, or a situation in which Armenia, Georgia, and Azerbaijan all refused to be bound.\textsuperscript{210}

Secretary of State Baker wrote the SFRC that "the Administration intends to implement the condition . . . in good faith and in the spirit in which it was negotiated."\textsuperscript{211} Specifically, Secretary Baker stated that the refusal of Ukraine or Byelorussia to be bound by the treaty would in all likelihood be considered a "changed circumstance." Secretary Baker added that

[i]f, in order to accommodate such a changed circumstance resulting from the emergence of a new state, Treaty participants were to agree to a 'change in the obligations' through a legally-binding side agreement, rather than a Treaty amendment, the Administration would submit such agreement to the Senate for advice and consent, just as it would an amendment to the Treaty.\textsuperscript{212}

2. Declarations

a. Accession

The committee attached a declaration to the resolution of ratification expressing the sense of the Senate urging "the President to seek the accession to the Treaty by any new state that may in the future be formed in the [treaty-covered zone]."\textsuperscript{213} This declaration was intended to apply to new states which formed in the wake of the disintegration of the Soviet Union.

b. Treaty Interpretation

As a result of the ABM Treaty reinterpretation dispute, the committee attached a declaration to the resolution of ratification in which "[t]he Senate affirms the applicability to all treaties of the constitutionally-based principles of treaty interpretation set forth in condition (1) in the \textit{INF}

\textsuperscript{209} 137 \textsc{Cong. Rec.} S17,845 (daily ed. Nov. 23, 1991).
\textsuperscript{210} \textit{SFRC CFE Report}, supra note 203, at 59.
\textsuperscript{211} 137 \textsc{Cong. Rec.} S17,869 (daily ed. Nov. 23, 1991).
\textsuperscript{212} \textit{Id.}
\textsuperscript{213} \textit{Id.} at S17,845.
Treaty's] resolution of ratification.”

c. Congressional-Executive Agreements

To underscore the Senate's opposition to the conclusion of arms control agreements as Congressional-Executive agreements, the committee attached the following declaration to the resolution of ratification:

The Senate declares its intent to approve international agreements that would oblige the United States to reduce or limit the armed forces or armaments of the United States in a militarily significant manner only pursuant to the Treaty Power as set forth in Article II, Section 2, Clause 2 of the Constitution.

The Senate's opposition to the use of Congressional-Executive agreements in arms control was amplified in the SFRC's CFE Report:

In attaching this declaration, the committee intends to make clear that it will consider militarily significant agreements only as treaties. The prominent case in point is the recently signed bilateral agreement on chemical weapons. That agreement imposes a permanent ban on the production of chemical weapons. As such, it is a militarily significant agreement that should be a treaty, and the committee intends to consider it as such if it is forwarded to the Senate. This declaration thus serves to put the administration on notice that it should proceed henceforth to any agreement on chemical weapons as a treaty.

A striking feature of this declaration is that it closely tracks the language in section 33 of the Arms Control and Disarmament Act, except in two key respects. The first respect, of course, is that section 33 on its face countenances the approval of arms control agreements as Congressional-Executive agreements. Secondly, and more interestingly, section 33 does not contain any language relating to the "military significance" of arms control agreements. Since there is no statutory or constitutional support for the proposition that "militarily significant" international obligations must be concluded as Article II treaties, and since the historical record on this point is decidedly mixed, the validity of the Senate's declaration springs only from the Senate's political tenacity, rather than from an authoritative source of law.

214. Id.
215. Id. at S17,846.
216. SFRC CFE Report, supra note 203, at 71.
217. See supra Part II(A).
218. In fact, § 33 arguably creates an altogether different significance threshold—the section only requires that arms control agreements which "reduce" or "limit" United States armed forces receive the endorsement of Congress. Therefore, under the terms of § 33, militarily significant agreements such as the Hotline Agreement, the Nuclear Risk Reduction Centers Agreement, or agreements providing for the advance notification of strategic exercises need not receive any congressional approval.
Finally, the SFRC attached a declaration to the resolution of ratification in which the Senate declared that it will consider Soviet resolution of two previous, sticky arms control compliance issues (the INF Treaty's SS-23 dispute and the ABM Treaty's Krasnoyarsk radar dispute) when it evaluates a future START agreement.\textsuperscript{219}

3. Floor Action

Senator Cohen offered the following amendment to the fifth condition in the resolution of ratification:

\begin{quote}
[If] no such change is agreed to by all state parties but the President determines nonetheless that continued adherence to the Treaty would serve the national security interests of the United States, [the President shall] seek the Senate's advice and consent to such continued adherence . . . .\textsuperscript{220}
\end{quote}

After some debate, Senator Cohen proposed a modification to his amendment, which required only that the President "seek a Senate resolution of support to such continued adherence . . . ."\textsuperscript{221} Senators Biden and Cohen indicated that the President would not be legally bound by such a Senate resolution.\textsuperscript{222} Senator Biden stated that the modified Cohen amendment had the support of the Administration;\textsuperscript{223} the Senate then approved the Cohen amendment by voice vote.\textsuperscript{224}

Senator Smith offered a condition to the resolution of ratification providing that

\begin{quote}
[the United States shall not be bound by the terms of this Treaty unless and until the Congress has received . . . . the President's Soviet Non-compliance with Arms Control Agreement report and the President has certified through the report that the Soviet Union is not in violation or probable violation of the terms of the CFE Treaty and protocols thereto.\textsuperscript{225}
\end{quote}

Senator Smith later offered a modified version of this amendment which required a presidential compliance report but did not condition United States adherence to the treaty on the report; the Senate approved the modified amendment by voice vote.\textsuperscript{226} The Senate approved the CFE

\textsuperscript{220} Id. at S17,855.
\textsuperscript{221} Id. at S17,868.
\textsuperscript{222} Id. at S17,870.
\textsuperscript{223} Id. at S17,869.
\textsuperscript{224} Id. at S17,871.
\textsuperscript{225} Id. at S17,881-82.
\textsuperscript{226} Id. at S18,033.
Treaty’s resolution of ratification by a vote of 90-4.\textsuperscript{227}

\section{The Role of the President, Senate and Congress in the Interpretation and Termination of Treaties}

Once a treaty has been ratified, the President has the power to interpret it, unilaterally or in agreement with treaty partners, pursuant to the President’s foreign affairs power.\textsuperscript{228} On the other hand, the President may not agree to amend a treaty in a major respect, or to conclude major supplemental agreements not contemplated by the treaty, without Senate or congressional approval. In addition, the President normally does not commit the interpretation of treaties to third-party dispute resolution, such as arbitration or adjudication by the International Court of Justice, without Senate or congressional acquiescence or approval. Moreover, if the President changes an earlier treaty interpretation, Congress may use its legislative and appropriations powers to force the President to reconsider.

The reinterpretation controversy involving the ABM Treaty is a good example of this phenomenon.\textsuperscript{229} When the President sent the ABM Treaty to the Senate for its advice and consent to ratification as an Article II treaty, Executive branch officials told the Senate that the treaty prohibited the development and testing of space-based ABM systems based on “other physical principles” than those existing in 1972, such as lasers. Thirteen years later the Reagan Administration “reinterpreted” the treaty to permit the development and testing of those space-based ABM systems. However, several senators, former officials who participated in the treaty negotiation, and many academic commentators vigorously disputed the Administration’s case. Congress used its legislative and appropriation powers to force the Executive branch to limit development and testing of ABM systems to activities permitted under the original interpretation.

In the Senate deliberations, two questions were raised: (1) whether the ABM Treaty properly interpreted would permit development and testing of space-based ABM systems, and (2) whether there are constitutional limits on Presidential interpretation power. In 1987 the Senate

\textsuperscript{227} \textit{Id.} at S18,038.

\textsuperscript{228} \textit{Restatement of the Foreign Relations Law of the United States (Third)} § 326 (1987). Domestic courts will give “great weight” to Executive branch interpretations. \textit{Id.}

\textsuperscript{229} For discussions of this issue, see the Symposium, \textit{Arms Control Treaty Reinterpretation}, 137 U. Pa. L. Rev. 1353 (1989); \textit{Glennon, supra} note 9 at 134-45. This Part has been adapted from Phillip R. Trimble, \textit{The Constitutional Common Law of Treaty Interpretation: A Reply to the Formalists}, 137 U. Pa. L. Rev. 1461 (1989).
considered, but declined to adopt, S. Res. 167,\textsuperscript{230} which provided that "during the period in which a treaty is in force, the meaning of that treaty is what the Senate understands the treaty to mean when it gives its advice and consent . . . ."\textsuperscript{231} In his opening statement at the hearing on the resolution Senator Biden explained that "during the life of the treaty the Constitution permits . . . only that interpretation [as presented by the executive branch and as understood by the Senate], unless the treaty is formally amended with the advice and consent of the Senate."\textsuperscript{232} S. Res. 167 reflected a stark assertion of senatorial prerogative. In support of the effort to prevent the President from reinterpreting the ABM Treaty to permit testing exotic ABM systems in space, S. Res. 167 would have entrenched all treaty interpretations "as understood by the Senate" at the time of consent to ratification; the President could not suggest differently unless he received a new, formal Senate consent (presumably by an affirmative vote of two-thirds of the Senators present).

The Reagan Administration responded with the Sofaer Doctrine. According to this Doctrine, a particular interpretation would be permanently binding if it were "authoritatively shared with, and clearly intended, generally understood and relied upon by, the Senate at the time of its advice and consent to ratification."\textsuperscript{233} The Sofaer Doctrine clearly was intended to give the Executive branch more latitude, although in retrospect it is difficult to understand why the Administration would have conceded that any interpretation would ever be permanently binding. In any event, the concepts under both S. Res. 167 and the Sofaer Doctrine are so vague that it is far from clear that the two formulations would necessarily produce different results in practice. "Generally understood" and "understood" are not necessarily different. Any formal communication to the Senate could easily be regarded by an interpreter to be "clearly intended" to contribute to the Senate's understanding. And any statement received from the Executive in a Senate hearing could reasonably be presumed to be "relied upon." In the end the Senate rejected both S. Res. 167 and the Sofaer Doctrine. In the hearings, the


\textsuperscript{231} S. Res. 167, § 2(2)(A), reprinted in \textit{Hearings}, supra note 230. The remaining relevant provisions of S. Res. 167 said that, in the absence of any Senate understanding on a particular point, the treaty is properly interpreted by a reference to the "text, as reasonably construed, in light of its object and purpose." \textit{Id.}

\textsuperscript{232} \textit{Hearings}, supra note 230.

original language of S. Res. 167 was criticized on legal grounds by Senators Lugar and Helms and by two private commentators. The private commentators specifically argued that interpretations may change over time, in response to new conditions and subsequent practice. Both private commentators called attention to the role of Senate acceptance of subsequent practice as a way of legitimizing a reinterpretation.

S. Res. 167 as reported reflected a significant change from the original language. It provided that the meaning of a treaty provision "is to be determined in light of what the Senate understands the treaty to mean when it gives its advice and consent." The majority language in the Committee Report, however, clung to the original idea that "the meaning of the treaty that the President ratifies is the meaning on which there existed a meeting of the minds between the President and the Senate at the time of Senate consent." It quoted former Chairman Fulbright to the effect that "a law means what its framers intended it to mean and not what a later generation of policymakers would like it to mean . . . ." On the other hand, Senator Helms characterized this part of the Committee Report as an attempt to "rewrite constitutional law." He explained that "[s]ubsequent practice gives to the Chief Executive the right to adjust the implementation of a treaty."

The Senate Foreign Relations Committee voted to report S. Res. 167, as amended, favorably by a vote of 11-8. Since the Resolution dealt with the substantive law of the ABM treaty as well as with the constitutional law of treaty interpretation, it is impossible to know whether some Senators may have agreed with the initial interpretation of the ABM Treaty, but may have disagreed with (or may have not had a view on) the constitutional principles contained in the Resolution, or vice versa. Such are the vagaries of legislative intent. In any event, the Senate did not take action on the Resolution, but Congress did—informally—frustrate the Reagan reinterpretation of the ABM Treaty by limiting appropriations for SDI. Thus, Congress imposed its view of the substantive law of the ABM Treaty, but did not express its view on the constitutional principles of treaty interpretation. The Senate inaction

234. See Hearings, supra note 230, at 179-82 (Senator Helms); id. at 182-83 (Senator Lugar); id. at 86-87 (Professor Baldwin); id. at 192-95 (Mr. Rovine).


236. Id. at 39.

237. Id.

238. Id. at 69.

239. Id.


was apparently part of a political compromise under which the Reagan Administration agreed to conform to the narrow interpretation of the ABM Treaty and the Senate agreed to "temporarily forego legislation that endorses the restrictive view of the treaty." 242 By declining to act on the Foreign Relations Committee recommendation, the Senate arguably laid the foundation for a negative implication to the effect that it did not wish to endorse the constitutional law principles embodied in S. Res. 167, as amended.

The Biden Resolution, S. Res. 167, and the constitutional issues, however, were not dead. Its proponents tried to win Senate endorsement of its constitutional doctrine on two subsequent occasions. First, in connection with the popular INF Treaty, the Biden Resolution, S. Res. 167, was revived as a proposed condition to that Treaty. 243 The Biden Condition embodied the old entrenchment principles: the United States shall not agree to an interpretation of a treaty different from the original understanding except by formal Senate consent. The purpose of the Biden Condition was "to articulate and affirm . . . constitutional principles" that "reflected a time honored [constitutional] practice." 244 The Biden Condition was directed "to the maximum degree possible" to the INF Treaty, but it was also designed to "affirm principles that inherently apply to the INF Treaty." 245 Some commentators objected that the Senate cannot change the Constitution by a unilateral resolution or condition. The Committee responded by stating that it was necessary in the context to register its non-acquiescence to the Sofaer Doctrine. Thus the Biden Condition, "paradoxically . . . [was] both unnecessary and highly significant." 246

The Biden Condition specifically provided that the INF Treaty "shall be subject to the following principles, which derive, as a necessary implication, from the provisions of the Constitution (Article II, Section 2, Clause 2) for the making of treaties . . . ." 247 The Committee's attempt to secure Senate approval of this general statement of constitutional law was once again unsuccessful. On the floor of the Senate, a substitute condition, now called the Byrd amendment, 248 deleted the language quoted above that indicated that the entrenchment principles were gen-

243. See INF REPORT, supra note 233, at 97, 436.
244. Id. at 96.
245. Id. at 97.
246. Id.
247. Id. The Condition then set forth the original entrenchment principles of S. Res. 167.
eral principles of constitutional law. Instead, entrenchment principles were applied as a condition to the INF Treaty, and were by their terms limited to that treaty.

The change was intentional and significant. During the Foreign Relations Committee deliberations, Senator Cranston, who took over leadership of this issue in the absence of Senator Biden, proposed three versions of the Biden Condition to Senator Lugar. Lugar rejected all three. Cranston then "introduced the toughest of the three, including the claim of constitutional authority, giving himself room to negotiate when the treaty reached the full Senate."249 As the debate on the Senate floor moved toward consideration of amendments and conditions, "Cranston said that he and Pell would be willing to remove the reference to constitutional authority from the language."250 This is exactly what happened. The entrenchment provisions embodied in the Condition were no longer said to "derive, as necessary implications, from the provisions of the Constitution." Instead, the Senate adopted a "condition, based on the Treaty Clauses of the Constitution," to the effect that the original understanding of the INF Treaty—and only that Treaty—would be entrenched.251 Once again, the Senate deliberately—and as part of a political compromise—declined to endorse the general "constitutional principles" embodied in S. Res. 167 and the Biden Condition.

Nevertheless, despite the language change, several Senators in the floor debate maintained that the revised Condition would still have the effect of making a general statement about constitutional law; in other words, a statement in favor of formal entrenchment. That view, however, was not the only view expressed by supporters of the Byrd amendment, and it is therefore not necessarily indicative of Senate intent. Fourteen Senators spoke in favor of the Byrd amendment. Eight interpreted the amendment to represent a general statement, while two others seemed to accept that it had no effect beyond the INF Treaty. Other supporters did not address the question. There obviously was no single view among the supporters who spoke as to the correct meaning or message of the Byrd amendment.

Only two Senators directly addressed the effect of the language change from the original Biden Condition. Senator Lugar, who both par-

250. Id.
251. The reference to the Treaty Clauses of the Constitution may still seem ambiguous. Literally it could either mean that the substance of the Condition was based on constitutional law, or it could mean that the Senate's action-procedurally-was based on the Constitution. Since the former would render the language change meaningless, the latter seems correct.
ticipated in the discussions leading to the compromise language in the amendment and voted for the amendment, offered the following view:

I rise to ask Senators to vote for the Byrd substitute. I do so having participated in the discussions with the distinguished majority leader, with colleagues on both sides of the aisle representing the Foreign Relations, Armed Services, and Intelligence Committees, and of course, our Republican leader, Senator Dole. . . . I hoped this particular amendment would not be necessary on the INF Treaty. Indeed, I described the entire operation as a mistake, in my judgment. I suspect that each one of us tries to determine what is relative and what is important, and it is apparent to me that a number of colleagues believe this matter is very important. Indeed, the majority leader has pointed out that in his judgment the role of the Senate in the treaty-making process is the most important factor superseding even perhaps the treaty we are discussing.

I would say, Mr. President, that my judgment about these matters is somewhat reversed. I come to a conclusion of support for this amendment because I believe the INF Treaty is very important, and it is apparent to me that the passage of this treaty would have been difficult within the time period which we are talking about without accommodation of colleagues listening to one another.\textsuperscript{252}

Senator Dole, another participant in the compromise discussions and a reluctant supporter of the amendment, echoed similar sentiments:

As I have discovered over the years, there are about three ways in this body to deal with disagreements.

We can argue and argue and argue, ad infinitum; and produce little but an especially fat edition of the \textit{Congressional Record}. Or we can put down our honest differences in pretty stark form, and then vote - up or down, winner take all.

Or, finally, we can look for compromise. It seemed to me after several hours of meetings that was our only real choice, if we wanted to get this treaty done, without a truly dangerous and damaging amendment attached to it. . . .

I want to correct any misunderstanding. The White House is not supporting this compromise. . . . They wanted some changes. They wanted some changes we did not give. Some of the changes were made: compromise.

So I think if I had my way this amendment would not be on this treaty. I do not think it even belongs here. But I know who is in the majority and I know where the votes are and I knew that the majority leader felt strongly about this issue on one side. Many others felt strongly on the other side . . . And so we did the best we could. The result, to me personally, is far from the best solution; again, I suggest that I am not the constitutional scholar. But to me, sincerely, it is the best we can achieve.

We ended up with a better result than we started with. The ma-

jority leader and others on that side were willing to make some conces-
sions. I think one key provision and one addition was what we call
subsection (4) . . . .
That provision makes clear, at least it does to me, that the deci-
sion we are making on this treaty applies solely to this treaty and does
not prejudice our position on the ABM interpretation issue at all . . . .
It is my understanding, based on the conversations—and I do not
believe I missed much of any of the meetings, that was pretty well the
feeling of most participants, Republicans and Democrats—that was
the effect of that subsection (4).253
Perhaps significantly, in his response to the Dole statement that con-
cluded the debate, Senator Byrd focused his constitutional arguments on
the INF Treaty alone.254
In the debate, therefore, there was no single or clear explanation of
the language change. Many voices spoke. Some continued to see an af-
firmation of general constitutional principles. Others viewed the debate
as another version of the ABM Treaty dispute. Still others opposed the
general principles embodied in the original Biden Condition, but went
along with the compromise in order to get the INF Treaty approved in
time for the Moscow summit. Even supporters of the original Condition
were willing to give up Senate endorsement of general constitutional
principles in order to avoid delaying the INF Treaty, a politically untena-
ble position for arms control supporters. Hence the compromise referred
to by Senators Lugar and Dole. The most plausible inference is that the
Senate decided to avoid a general constitutional statement. They en-
trenched the original understanding of the INF Treaty, but did nothing
else.255
Unfortunately the debate did not reflect much discussion of the re-
lated question of how an entrenched meaning can change. Only Senator
Lugar spoke on this point:
I point out, furthermore, that the checks and balances of our Gov-
ernment still work, and I appreciate the frustration of many colleagues
on the other side of the aisle who feel that the current administration
has attempted to reinterpret a treaty. In my own judgment, the cur-
rent administration did not attempt to reinterpret a treaty. The ambi-

253. Id. at S6781-82.
254. Id. at S6782-83.
255. The next day Senator Specter offered an amendment to the effect that neither the Biden
Condition, as amended, nor the Foreign Relations Committee Report on the INF Treaty would
change existing constitutional law. That amendment was rejected, by a vote of 64-33, arguably
creating a negative implication that the Senate did seek to change constitutional law. Nevertheless,
the four Senators who spoke in opposition seemed to regard this amendment merely as a threat to
the earlier compromise reached on the Byrd amendment and as means of reviving the Sofaer Doc-
trine. At least two also interpreted it as an attempt to elevate the status of international law over the
constitutional law of the United States. See id. at S6890-91.
guity at least in the ABM Treaty has been cited by the administration as a basis for interpretation. But let us take the worst case, that the current administration deliberately took a look at a proposition that both the Senate and the President had looked at and went entirely in a different direction. In truth, Mr. President, we have in front of us the actual political history of the past two years, and that is the majority party in the Senate has not agreed with the interpretation of the President of the United States of how we ought to develop the SDI program, and as a result that program has either been stymied or has been tailored to fit the will of the majority.

Now, I have not agreed with the tailoring or the stymieing, but nevertheless, I recognize that in our political system this is the way it works. In short, even if a President should attempt to reinterpret a treaty, the checks and balances of the legislative-executive relationship check any exercise of arbitrary judgment or arbitrary authority.

Therefore, Mr. President, I saw no particular reason to try to pin all of this down 15 different ways. It seems to me the system works adequately as it stands . . . .

Nevertheless, persistence paid off. In connection with the CFE Treaty, discussed above, the Senate adopted a declaration incorporating the INF Condition and stating that it applied to all treaties. This declaration, while not purporting to be legally binding, is noteworthy because it states a Senate position on treaty interpretation which the Senate had declined to adopt when the issue was hotly disputed over the ABM Treaty and the INF Treaty. The INF Treaty Condition referred to in this declaration applied only to the INF Treaty; the CFE declaration refers to "all treaties." Although it is not binding, this declaration represents a political triumph for Senator Biden and his allies who were unable to prevail before. The record does not reflect discussion of the precise issue, and the President, although a vocal proponent of Presidential power, does not seem to have noticed. Nevertheless, this Senate action, when considered with its declaration regarding the form of the Chemical Weapons Agreement, shows the strong propensity of the Senate to defend its constitutional prerogative.

After all the controversy little is settled. Most commentators would probably agree that the President may not reinterpret fundamental treaty provisions in major respects, even with the agreement of a treaty partner, without seeking Senate or congressional consent. Such a change would properly be classified as a "major amendment" to the treaty and, as such, would require that consent. The record of Senate deliberations of arms control treaties reflects clear Senate concern that its role not be ignored in amendments contemplated by approved treaties. As to supplemental

agreements contemplated by a treaty they would seem to be implicitly approved, and that seems to have been uncontentious. It would also seem that minor reinterpretations, as well as minor amendments, could be made by the President with Senate or congressional acquiescence. If Congress disagrees with a Presidential interpretation, it may reflect its non-acquiescence through its legislative or appropriations power. Finally, conditions formally adopted, like that to the INF Treaty, should bind the President if he chooses to ratify the treaty.

Another area of recent controversy concerns the termination of treaties. President Carter terminated an Article II defense treaty in accordance with its terms, despite a "sense of the Congress" expression that he should consult with Congress before any such change in policy. In Goldwater v. Carter257 the Supreme Court dismissed a complaint filed by some members of Congress to enjoin the Presidential action. The plurality opinion invoked the political question doctrine. Since that time the President has claimed the right to terminate Article II treaties in accordance with their terms. Congress has acquiesced. The President has also successfully asserted the right to declare a treaty partner to be in "material breach" of its terms, so that the United States may withdraw from the treaty. Finally, the President has successfully asserted the right to violate the terms of a treaty or other norms of international law in the course of conducting the nation's foreign relations, at least in the absence of Congressional action prohibiting such a violation. Those rights are based on the President's foreign affairs power.

V. Conclusion

The formal record which we have reviewed shows that individual Senators on many occasions have sought to defend senatorial prerogative in the treaty-making, treaty-interpretation, and treaty-termination process. However, the Senate as a body has not endorsed these efforts, but rather has conceded an equal role to the House of Representatives in treaty-making, and has been most effective in influencing treaty interpretation through use of the legislative and appropriations powers. With respect to substantive influence on arms control, the Senate has rarely adopted formal conditions to negotiated agreements, but instead has served as a forum for expressing conservative opposition to arms control and dealing with the Soviet Union, as well as for reinforcing support for robust military spending programs. This conservative influence has per-

vasively, if indirectly, influenced U.S. arms control policy. The effect has been conservative and cautionary.

For the future it would seem that arms control, and especially arms reduction, should be as important as ever. In light of the end of the Cold War, the need to reduce arms in a stable and predictable manner, and to unprecedented degrees, is especially urgent. To that end, it seems desirable to reconsider the use of the Article II process for arms control treaties. We have demonstrated that the Congressional-Executive agreement is a legitimate constitutional alternative under a normal legal analysis. There are more fundamental reasons as well to shift to the Congress as a whole. Much attention has recently been devoted to the role of principles of democracy in constitutional interpretation. Such an approach strongly suggests more use of Congressional-Executive agreements in lieu of Article II treaties. There are many theories of democracy, but the Senate has a weak claim to decision-making authority under any version of democratic theory. Its supermajority requirement in treaty-making gives a minority (one third plus one) of Senators the ability to veto a treaty. Minority power is further enhanced by the potential use of the filibuster that can only be overcome by another supermajority. Rural and conservative constituencies are disproportionately favored by the composition of the Senate and can block agreements that are preferred by a national majority or that are desirable in the President’s and Congress’s long-term view of the national interest. The termination of the defense treaty with Taiwan illustrates the point. The President’s decision to terminate the treaty and to proceed with the normalization of relations with China could have been frustrated by a minority of conservative Senators if a two-thirds vote of the Senate were required to terminate the treaty.

Historically, agreements dealing with arms control have been submitted to the Senate as Article II treaties. Today, however, arms reduction may have as much domestic effect as foreign policy relevance. The reduction of the standing army would have a substantial effect on jobs and communities. Because this domestic environment is increasingly important in terms of the actual effect of arms control, it now seems especially appropriate to conclude these agreements as Congressional-Executive agreements.

Perhaps the Senate’s Article II modern role should focus on agreements that deal with matters of special interest to the states as states,

such as private international law treaties whose principal effect is to change state law, and perhaps some human rights treaties that, to the extent that any change in law is required, primarily affect state law (like the racial discrimination convention).

Professor Henkin endorses more House involvement and suggests that the House and Senate establish a committee to work out a division of authority between Article II treaties and Congressional-Executive agreements. Such an approach would require the Senate to look at these issues primarily in terms of its Article II prerogative in the abstract, divorced from the politics of particular agreements. It seems doubtful that the Senate would readily agree to surrender authority not yet explicitly lost. Perhaps the more realistic approach is for the President to take the initiative with particular agreements, and to push toward more Congressional-Executive agreements as President Bush has done with the U.S.-Soviet Chemical Weapons Agreement.